Supreme Court, U.S.
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No. 94-47

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JOHN H. CAMPBELL, M.D.,
Petitioner,

v.

SHARLISIA SUTTLE WILLIAMS,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Alabama

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state may constitutionally impose an award of punitive damages on one defendant based in part upon the culpability of an unrelated tortfeasor.

2. Whether the non-apportionment of the punitive damages award against Dr. John Campbell violates Dr. Campbell's substantive and procedural due process rights.

3. Whether the non-apportionment of the punitive damages award violates Dr. John Campbell's due process rights by denying him the procedural safeguards guaranteed in *Pacific Mutual Life Ins. Co. v. Haslip,* 499 U.S. 1 (1991).

4. Whether the non-apportionment of the punitive damages award violates Dr. John Campbell's right to equal protection of the laws.

PARTIES TO THE PROCEEDINGS

The petitioner in this proceeding is John H. Campbell, M.D. Dr. Campbell was the Appellant in the Supreme Court of Alabama. Petitioner is hereinafter referred to as Dr. Campbell.

The respondent in this proceeding is Sharlisia Suttle Williams, as Administratrix of the Estate of Lillie Mae Suttle Sumpter, deceased. Ms. Williams was the Appellee in the Supreme Court of Alabama.

The State of Alabama is not a party to this proceeding, but because this proceeding involves a constitutional challenge to a State statute, 28 U.S.C. § 2403(b) may be applicable. The attorney general of the State of Alabama has been served with a copy of this proceeding.

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PETITION FOR A WRIT OF CERTIORARI

John H. Campbell, M.D., petitions for a writ of certiorari to review the judgment of the Supreme Court of Alabama.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama is not officially reported, but is cited on Westlaw as 1994 WL 46867 (Ala.). The opinion is reprinted in the Appendices at 1a. The ruling of the Circuit Court of Etowah County, Alabama, on Dr. Campbell's motion for judgment notwithstanding the verdict, or in the alternative for a new trial, or, in the alternative for remittitur is not reported. The ruling of the Circuit Court is reprinted in the Appendices at 39a. The ruling of the Supreme Court of Alabama on the petition for rehearing is not reported and is reprinted in the Appendices at 53a.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on February 18, 1984. A timely petition for rehearing was filed on March 4, 1994. The petition for rehearing was denied on April 8, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Const. amend. XIV.

STATEMENT OF THE CASE

The underlying case arises from the Alabama Wrongful Death Act [codified as § 6-5-410 of the *Code of Alabama* (1975)]. The pertinent part of the Alabama Wrongful Death Act states:

> "A personal representative may commence an action and recover such damages as the jury may assess in a court of competent jurisdiction within the State of Alabama, and not elsewhere, for the wrongful act, omission, or negligence of any person, persons, or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, provided the testator or intestate could have commenced an action for such wrongful act, omission, or negligence if it had not caused death."

Ala. Code § 6-5-410(a) (1975).

The purpose of the Alabama Wrongful Death Act is the "prevention of homicide." (App. 14a). The State

seeks to achieve this interest through punishment and deterrence. Accordingly, the Alabama Supreme Court has held that only punitive damages are recoverable in wrongful death actions and that punitive damages are recoverable simply upon a showing of negligence. *Black Belt Wood Co., Inc. v. Sessions*, 514 So. 2d 1249, 1258 (Ala. 1986). Even though the damages assessed are punitive in nature, the Alabama Supreme Court has held that the damages cannot be apportioned among multiple defendants based on their respective culpability, but rather all defendants are jointly liable for the totality of punitive damages assessed against all defendants.[1] *Id.*

The application of this statute to this case arises from the following. On March 9, 1987, Ms. Lillie Mae Sumpter was employed at Gulf States Steel in Gadsden, Alabama. (App. 1a). Ms. Sumpter suffered second and third degree burns on her face and upper body when she was struck by molten steel. (App. 1a). Ms. Sumpter was taken to the emergency room of Holy Name of Jesus Medical Center in Gadsden. (App. 1a). She was admitted to the hospital as the patient of Dr. John Campbell. (App. 1a). Dr. Campbell treated Ms. Sumpter for her burns and monitored her condition. (App. 2a). Dr. Campbell did not intubate Ms. Sumpter and did not examine her airway using a fiberoptic bronchoscope. (App. 2a).

On March 10, 1987, Ms. Sumpter began experiencing respiratory distress. (App. 2a). The attending nurse contacted Dr. Campbell by telephone and Dr. Campbell ordered an immediate intubation. (App. 3a). Attempts at intubation by the hospital staff failed. (App. 3a). Dr. Campbell was called and informed of the situation by the attending nurse. Dr. Campbell ordered the attending nurse

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[1] This Court has held that the Alabama Wrongful Death Act is not unconstitutional simply because it permits recovery of only punitive damages. *See, Louis Pizitz Dry Goods Co. Inc. v. Yeldell*, 274 U.S. 112 (1927). This Court has never considered the questions presented here.

to call an emergency code for any physician in the hospital to immediately perform an emergency tracheostomy. (App. 3a). The attending nurse testified at trial that Dr. Wilfredo Grana responded to the code, but upon arriving in the emergency room stated that he was incapable of performing a tracheostomy. (App. 3a). Dr. Campbell, who had been en route to the hospital, then arrived and performed the tracheostomy. (App. 3a). Unfortunately, Ms. Sumpter suffered respiratory failure prior to the tracheostomy and lapsed into a coma. (App. 2a). She did not recover and died on April 15, 1987. (App. 2a).

On February 17, 1989, Sharlisia Suttle Williams, as Administratrix of the Estate of Lillie Mae Sumpter, filed a wrongful death action pursuant to § 6-5-410 of the *Ala. Code.* (C. 22-36).[2] Dr. Campbell, Holy Name of Jesus Medical Center, and Dr. Grana were named as defendants. The complaint alleged that Dr. Campbell negligently failed to transfer Ms. Sumpter to University Hospital in Birmingham as required by Holy Name of Jesus Medical Center's protocol for the treatment of major burn patients. The complaint also alleged that Dr. Campbell negligently failed to intubate Ms. Sumpter or to examine her upper airway by use of a fiberoptic bronchoscope. (App. 2a). The allegations in the complaint against Holy Name of Jesus Medical Center were, *inter alia,* that the hospital was negligent in its treatment of the deceased and its failure to enforce the hospital's policy regarding admission and transfer of major burn patients. (App. 14a). The complaint alleged that Dr. Grana was negligent in failing to perform a tracheostomy. (App. 14a).

On July 20, 1989, Dr. Campbell filed his answer, denying all material allegations of the complaint. (C. 223-224). He subsequently filed an amended answer, assert-

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[2] The record on appeal in the Supreme Court of Alabama consists of the clerk's record and the reporter's transcript. The clerk's record is cited herein as "C. ——" and the reporter's transcript is cited herein as "R. ——".

ing additional defenses relating to the constitutionality of the Wrongful Death Act. (C. 762-769). In particular, Dr. Campbell pled that the non-apportionment of punitive damages under the Alabama Wrongful Death Act violated the due process clause and the equal protection clause of the Fourteenth Amendment. (C. 763-768).

At the trial of the case, Dr. Campbell testified that he met the standard of care in all aspects of his care and treatment of Ms. Sumpter. (App. 3a). At the close of the evidence, Dr. Campbell filed a motion for separate verdict forms as to each defendant. (C. 862-864). In this motion, Dr. Campbell stated as follows:

> In its amended answer this defendant has respectfully suggested unto the Court that the Alabama Wrongful Death Act is unconstitutional if it is interpreted so as to permit an award of punitive damages against one defendant based upon the conduct of some other defendant or other person for whom the defendant in question is not responsible. To cure this constitutional infirmity this defendant respectfully suggests that the Court should instruct the jury that any damages awarded against this defendant may be based solely upon the culpability of the conduct of this defendant and not based upon the culpability of the conduct of any other defendants or any other person.
>
> WHEREFORE, PREMISES CONSIDERED, this defendant requests this Court to so charge the jury and to provide the jury with verdict forms so as to facilitate the return of a separate verdict against each defendant rather than a joint verdict against all defendants.

The trial court denied this motion. (R. 1516).

Prior to jury deliberations, the trial court instructed the jury as follows in regard to assessing damages under the Wrongful Death Act:

> "In a suit brought for a wrongful death, omission or negligence causing death—and that's to dam-

ages—the damages recoverable are punitive and not compensatory. Damages in this type of action are entirely punitive, imposed for the preservation of human life, and as a deterrent to others to prevent similar wrongs.

The amount of damages should be directly related to the amount of wrongdoing on the part of the defendant. In assessing damages you are not to consider the monetary value of the life of the decedent, for damages of this type, in this type of action are not recoverable to compensate the family of the deceased from a monetary standpoint on account of her death, nor to compensate the plaintiff for any financial or pecuniary loss sustained by her or the family of the deceased on account of her death." (R. 1685).

The jury was then presented with general verdict forms which required the jury to return a single verdict against all defendants who were found liable. (C. 874 and R. 1687-1688).

During jury deliberations, two events occurred which would come to bear on the judgment entered against Dr. Campbell. First, the jury presented the trial judge with the following question:

> "We the jury, are undecided. If found guilty, do we decide if the defendants amount to be paid is broken down or is it one amount?" (S.C. 6).[3]

In response to this inquiry, the trial court replied in the negative and did not allow the jury to apportion damages. Second, while the jury was deliberating, counsel for Dr. Campbell advised the trial court that they suspected Ms. Williams and Holy Name of Jesus Medical Center had entered into a pro tanto settlement. (App. 4a). Counsel for Dr. Campbell requested that the trial court order Ms.

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[3] A supplemental clerk's record was filed in the Supreme Court of Alabama. The abbreviation "S.C. ——" is used to reference cites in this record.

Williams and Holy Name of Jesus Medical Center to reveal this settlement so that the jury could be informed of its terms. (App. 4a). The trial court refused to order Ms. Williams and Holy Name of Jesus Medical Center to reveal the pro tanto settlement. (App. 4a).

The jury returned a verdict against Holy Name of Jesus Medical Center and Dr. Campbell. This verdict was a general verdict against both defendants jointly in the amount of $4,000,000.00. (App. 4a).

After the jury returned the verdict, the pro tanto settlement between Holy Name of Jesus Medical Center and Ms. Williams was revealed. Under the pro tanto settlement, Holy Name of Jesus Medical Center agreed to pay $1,000,000.00 in settlement of the claim against it. (App. 5a). The $1,000,000.00 settlement was set off against the jury verdict and the trial court entered a judgment of $3,000,000.00 against Dr. Campbell. (App. 5a).

On October 23, 1992, Dr. John H. Campbell timely filed a motion for judgment notwithstanding the verdict, or in the alternative for new trial, or in the alternative, for leave from judgment, or in the alternative for remittitur. (C. 884-904). In paragraphs 30, 31, 34, 35, 36, 37, and 39 of Dr. Campbell's motion for new trial, Dr. Campbell renewed the contention that the non-apportionment of punitive damages among multiple defendants under the Wrongful Death Act violates the due process clause of the Fourteenth Amendment and the equal protection clause of the Fourteenth Amendment. (C. 890-895). The trial court denied the post-trial motions of Dr. Campbell on February 19, 1993. (App. 52a). Notice of appeal to the Supreme Court of Alabama was filed on behalf of Dr. Campbell on March 4, 1993. (C. 2465-2474). In his appeal, Dr. Campbell asserted that the Alabama Wrongful Death Act is unconstitutional as applied in cases involving multiple defendants. (App. 5a). The issues of due process and equal protection were

separately addressed and briefed by Dr. Campbell to the Supreme Court of Alabama. (App. 5a).

The Alabama Supreme Court affirmed. In regard to the constitutional challenges, the Supreme Court of Alabama held that "[t]he non-apportionment of punitive damages among multiple defendants in wrongful death cases bears a rational relationship to a legitimate state interest—the prevention of homicide—and it thus does not violate constitutional guarantees." (App. 14a).

REASONS FOR GRANTING THE PETITION

The decision of the Supreme Court of Alabama denied petitioner, Dr. Campbell, the procedural safeguards necessary to satisfy the Fourteenth Amendment. Non-apportionment of punitive damages is fundamentally unfair and constitutionally flawed. The decision of the Supreme Court of Alabama upholding the non-apportionment of punitive damages also violates Dr. Campbell's substantive and procedural due process rights as non-apportionment allows the plaintiff to arbitrarily execute damages against joint tortfeasors without regard to each defendant's culpability. Furthermore, the joint assessment of punitive damages automatically precludes application of the procedural safeguards identified by this Court in *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1 (1991). As this Court recently has recognized, those procedural safeguards are imperative because "[p]unitive damages pose an acute danger of arbitrary deprivation of property." *Honda Motor Co., Ltd. v. Oberg,* 512 U.S. —— (1994). The decision of the Supreme Court of Alabama also denied Dr. Campbell equal protection of the laws by recognizing unreasonable classifications among defendants in cases awarding punitive damages. The decision of the Alabama Supreme Court is in conflict with other state and federal court decisions, and is repugnant to the Fourteenth Amendment of the United States Constitution. Dr. Campbell seeks this Court's review to resolve these

conflicts and to provide him with the constitutional guarantees of the Fourteenth Amendment.

I. JOINT LIABILITY FOR PUNITIVE DAMAGES AMONG MULTIPLE DEFENDANTS VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

The rudimentary element of due process is fairness. This Court has held that "Due Process" expresses the requirement of fundamental fairness. *Lassiter v. Dept. of Social Services of Durham County,* 452 U.S. 18, 24 (1981). "In its Fourteenth Amendment, our Constitution, imposes on the States the standards necessary to insure that judicial proceedings are fundamentally fair." *Id.* at 33. Procedural due process guarantees an individual "a fair procedure with any deprivation of life, liberty, or property by a state." *Collins v. City of Harker Heights, Texas,* —— U.S. —— (1992), 112 S. Ct. 1061, 1068. This Court has held that in judging a procedure, it must determine whether the procedure "offend(s) those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous crimes." *Rochin v. People of California,* 342 U.S. 165, 169 (1952) (quoting *Malinski v. People of the State of New York,* 324 U.S. 401, 416-17 (1945)).

Nothing is more offensive to the canons of decency and fairness than the non-apportionment of punitive damages among joint tortfeasors. This Court has held that punitive damages are not compensation for injury, but "are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Gertz v. Welch,* 418 U.S. 323, 349 (1974). This Court has held that "by definition, punitive damages are based upon the degree of the defendant's culpability." *Massachusetts Bonding & Ins. Co. v. United States,* 352 U.S. 128, 133 (1956). Furthermore, this Court has recognized that "[a]ll punitive legislation contemplates some

relation between guilt and punishment. To inflict the latter where the former does not exist would shock the sense of justice of everyone." *Felton v. United States,* 96 U.S. 699, 703 (1877). Non-apportionment of punitive damages under the Alabama Wrongful Death Act allows an individual to be punished for acts he did not commit. Even though a defendant may have had no control over the conduct of a co-defendant or did not act in concert with that defendant, he may be punished for that defendant's conduct. Any award of damages against a defendant based upon the conduct of an unrelated tortfeasor violates fundamental notions of justice and fair play. The non-apportionment of punitive damages is contrary to basic principles of fundamental fairness and denies the right to due process.

This Court addressed an analogous situation in *Washington Gas-Light Co. v. Lansden,* 172 U.S. 534 (1899). There, the plaintiff brought an action for libel against a defendant corporation and its agents. During the course of the trial, evidence was admitted, over objection, relating to the capital stock of the corporation and the dividends declared by the corporation. *Id.* at 552. The purpose of this evidence was to give the jury a basis upon which to calculate exemplary damages. *Id.* The trial court did not instruct the jury that this evidence was only admissible for this purpose. *Id.* at 551. The jury did not return separate verdicts against each defendant found liable, but returned a general verdict. *Id.* at 535.

On appeal, the individual defendants contended that evidence of the corporation's wealth was inadmissible against them. *Id.* at 552-553. The individual defendants argued that evidence of the corporation's wealth might affect the amount of punitive damages awarded against the corporation by the jury and should not be the basis for a verdict entered against them. *Id.*

This Court held that evidence of the corporation's wealth was inadmissible as to the individual defend-

ants. *Id.* This Court held that evidence of the corporation's wealth was admitted for the purpose of calculating punitive damages against the corporation and that the trial court should have instructed the jury of this purpose and that the corporation's wealth was not to be considered in assessing damages against the individual defendants. The Court stated that under these circumstances the verdict might be enhanced by the evidence of the wealth of one defendant, but be collected from the defendant that is least culpable and least able to respond. *Id.* at 552. This Court held that "there is no justice in allowing the recovery of punitive damages, in an action against several defendants, based upon evidence of the wealth and ability to pay such damages on the part of one of the defendants only." *Id.* at 553.

This Court is now presented with an analogous situation. In wrongful death actions involving multiple defendants, evidence is presented regarding the acts and culpability of each individual defendant. In assessing damages, the jury is instructed that the amount of damages should be directly related to the amount of wrongdoing on the part of the defendant. Yet, non-apportionment of punitive damages requires the jury to return a single verdict against all defendants. Any part or all of this verdict may be executed arbitrarily against any of the defendants found liable, including the defendant that is least culpable. As the jury is not allowed to apportion damages in regard to each individual defendant's culpability, the damages assessed against each defendant are not proportionate to his conduct. Non-apportionment of punitive damages awarded pursuant to the Wrongful Death Act violates each defendant's constitutional right to due process because all defendants risk being punished for the conduct of a co-defendant. The imposition of punitive damages upon one defendant based in part upon the conduct of another defendant is inherently unfair and allows for punishment to be inflicted without regard to culpability. Such an arbitrary imposition of punish-

ment is a denial of substantive and procedural due process rights. Just as a defendant should not have punitive damages imposed upon him based upon another defendant's wealth, neither should a defendant have punitive damages imposed upon him based upon another defendant's culpability.

Non-apportionment of punitive damages among joint tortfeasors is also in conflict with other state and federal court decisions. The majority of states that have addressed the issue of apportionment of punitive damages have held that punitive damages may be apportioned among joint tortfeasors. The leading case in this area is *Embrey v. Holly*, 442 A.2d 966 (Md. 1982). In *Embrey*, the Court of Appeals of Maryland held that in order for punitive damages to be fair and effective, they "must relate to the degree of culpability exhibited by a particular defendant and that party's ability to pay." *Id.* at 973. The court cited *Washington Gas-Light Co. v. Lansden* with approval and stated:

> "Therefore, while a defendant who is least culpable may remain liable for all the compensatory damages suffered by plaintiff, given the purpose of a punitive award, there is no justice in allowing similar recovery of such damages in an action against several defendants based upon the evidence of the wealth and *blameworthiness* of one other than he who must pay the exemplary award." *Id.* at 974 (emphasis added).

The court held that based on the nature of punitive damages, an award of punitive damages should be apportioned between joint tortfeasors. *Id.* at 973.[4]

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[4] *E.g., Coty v. Ramsey Assoc. Inc.*, 546 A.2d 196 (Vt. 1988); *Huckeby v. Spangler*, 563 S.W.2d 555 (Tenn. 1978); *Edquest v. Tripp & Dragstedt Co.*, 19 P.2d 637 (Mont. 1933); *Hall v. Cook*, 400 S.W.2d 39 (Mo. 1966); *Remeikis v. Boss & Phelps Inc.*, 419 A.2d 986 (D.C. 1980); *Shetka v. Kueppers, Kueppers, Von Feldt, and Salmen*, 454 N.W.2d 916 (Minn. 1990); *Mauk v. Brundage*, 67 N.E. 152

Several federal courts have also rendered decisions concerning the apportionment of punitive damage awards. In *Smith v. Lightning Bolt Productions*, 861 F.2d 363 (2d Cir. 1988), the Second Circuit addressed the issue of joint liability for punitive damages. Applying New York law, the court held that joint liability for a punitive damage award is improper. The Second Circuit stated that punitive damages are intended "as a penalty against a defendant who has exhibited a high degree of moral culpability and as a deterrence against further similar conduct by that defendant." *Id.* at 374. The court stated that the purposes underlying an award of punitive damages are defeated if the judgment allows a defendant the "opportunity to escape payment of the penalty assessed." *Id.*[5]

Federal courts have also addressed the issue of joint liability for punitive damages in civil rights claims brought under 42 U.S.C. § 1983. The Second Circuit first addressed this issue in *McFadden v. Sanchez*, 710 F.2d 907 (2d Cir. 1983), *cert. denied*, 464 U.S. 961 (1983). In

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(Ohio 1903); *Hotel Riviera, Inc. v. Short*, 396 P.2d 855 (Nev. 1964); *Sierra Blanca Sales Co., Inc. v. Newco Industries, Inc.*, 542 P.2d 52 (N.M. Ct. App. 1975), *rev'd on other grounds*, 548 P.2d 865 (N.M. 1976); *McCurdy v. Hughes*, 248 N.W. 512 (N.D. 1933); *Louisville & N. R. Co. v. Roth*, 114 S.W. 264 (Ky. 1908); *St. Louis & S. W. Railway Co. of Texas v. Thompson*, 113 S.W. 144 (Tex. 1908); *Thomson v. Catalina*, 271 P. 198 (Cal. 1928); *Fredericks v. Commercial Credit*, 143 S.E. 179 (S.C. 1928); *Shields v. Martin*, 706 P.2d 21 (Idaho 1985); *Freeman v. Sproles*, 131 S.E.2d 410 (Va. 1963); *Smith v. Printup*, 866 P.2d 985 (Kan. 1993); *Rose v. Whitbeck*, 564 P.2d 671 (Or. 1977); *Rubi v. Transamerica Title Ins. Co.*, 641 P.2d 891 (Ariz. Ct. App. 1981).

[5] *E.g., Faison v. Nationwide Mortgage Corp.*, 839 F.2d 680 (D.C. Cir. 1987); *Bosco v. Serhant*, 836 F.2d 271 (7th Cir. 1987); *Fontenot v. Fina Oil & Chem. Co.*, 772 F. Supp. 950 (E.D. Tex. 1991); *Pyramid Condominium Association v. Morgan*, 606 F. Supp. 592 (D. Md. 1985); *Ford Motor Credit Co. v. Hill*, 245 F. Supp. 796 (W.D. Mo. 1965); *see, Loughman v. Consol-Penn. Coal Co.*, 6 F.3d 88, 100-101, n.6 (3d Cir. 1993).

McFadden, the plaintiff brought an action on behalf of her deceased son. The plaintiff claimed that four police officers violated her son's constitutional rights during an attempted arrest and that it resulted in her son's death. *Id.* at 909. The jury assessed $200,000.00 in punitive damages jointly against the four police officers. *Id.* at 910.

On appeal, the police officers argued that it was error for the defendants to be jointly liable for punitive damages assessed in a § 1983 action. The court held that in a § 1983 action, punitive damages should be individually assessed. *Id.* at 914. The court stated that an award of punitive damages in a § 1983 action serves to punish the defendant for denying the plaintiff's rights and serves to deter future violations. *Id.* at 913. The court stated that "[t]he degree of appropriate punishment and the extent to which deterrence may be achieved at an individual's expense are obviously matters appropriate for individualized determination." *Id.* The court went on to state that "[t]he function of punitive damages in section 1983 suits points forcefully toward assessing individually each defendant's liability for such damages and determining an appropriate amount." *Id.* The court stated that a jury so instructed could have found varying degrees of culpability among the defendants and assessed punitive damages accordingly. *Id.* at 914.

In *Davidson v. Dixon*, 386 F. Supp. 482 (D. Del. 1974), *aff'd without opinion*, 529 F.2d 511 (3d Cir. 1975), the court stated that the purpose of punitive damages is to punish the defendant and to deter similar wrongs in the future. The court stated that punitive damages are "imposed for their effect on the defendant" and any benefit to the plaintiff is a windfall. *Id.* at 490.[6]

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[6] Similarly, the Alabama Supreme Court has stated that the plaintiff is not entitled to any compensation in a wrongful death action, but acts as an agent of the State in bringing suit. *Tatum v. Schering*, 523 So. 2d 1042, 1046 (Ala. 1988) (Houston, J., dissenting).

The court held "that each defendant's conduct may be independently evaluated in assessing punitive damages and that separate awards for such damages may be made against different defendants." *Id.* at 489-490. Based on this analysis, the court held that the policy underlying punitive damages is best served when separate awards for punitive damages are made against each defendant.[7]

II. JOINT LIABILITY FOR PUNITIVE DAMAGES ELIMINATES THE PROCEDURAL SAFEGUARDS OF *PACIFIC MUT. LIFE INS. CO. v. HASLIP*

In *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1 (1991), this Court concluded that a punitive damage award was not violative of the due process clause of the Fourteenth Amendment.[8] This Court noted three procedural safeguards in the Alabama punitive damages scheme which adequately protect the procedural due process rights of defendants. The jury instructions governing punitive damages, the post-trial review of punitive damage awards, and the appellate review of punitive damage awards by the Alabama Supreme Court were cited as providing defendants procedural protection. *Id.* at 19-23. Non-apportionment of punitive damages under the Alabama Wrongful Death Act eradicates all of these procedural safeguards and allows for punitive damages to be assessed against defendants arbitrarily and without regard to each defendant's culpability.

This Court recently has recognized that "[p]unitive damages pose an acute danger of arbitrary deprivation of property." *Honda Motor Co., Ltd. v. Oberg,* 512 U.S. —— (1994). In *Honda,* this Court stated that judicial

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[7] *E.g., McKinnon v. City of Berwyn,* 750 F.2d 1383 (7th Cir. 1984).

[8] This award was rendered against an insurance agent and an insurance carrier under a respondeat superior theory. It did not represent a joint award based upon the separate conduct of two unrelated defendants as is the case here.

review of the amount awarded is one of the few procedural safeguards that protects against this danger. This Court held that judicial review of the amount awarded is required even when there is a proper jury instruction because there "is the possibility that a jury will not follow those instructions and may return a lawless, biased, or arbitrary verdict." *Id.* at ——. Taken together, this Court's opinions in *Haslip* and *Honda* indicate that an award of punitive damages violates the due process clause unless there are procedural safeguards in the form of proper jury instructions and post-trial judicial review of the amount awarded. Clearly, when a defendant is stripped of these procedural safeguards there is the acute and likely danger that he will be arbitrarily deprived of his property.

Dr. Campbell has clearly been denied the first procedural safeguard, which is a proper jury instruction. The non-apportionment of punitive damages renders the procedural safeguard provided by jury instructions meaningless. Dr. Campbell does not take issue with the instructions concerning the description of punitive damages. The trial court appropriately described the purpose of punitive damages and how the jury was to assess these damages. The trial court appropriately instructed the jury that the damages are "entirely punitive" and that they serve the purposes of punishment and "of protecting the public by deterring the defendants and others from doing such wrong in the future." (R. 1686). Furthermore, the trial court instructed the jury that "the amount of damages should be directly related to the amount of wrongdoing on the part of the defendant" and that "in fixing the amount, you must take into consideration the character and degree of the wrong as shown by the evidence in the case and the necessity for preventing similar wrongs in the future." (R. 1685, 1686).

Although these instructions "reasonably accommodated" Dr. Campbell's interest, the jury instruction was flawed

because the "individualized assessment of appropriate deterrence and retribution" was eliminated when the jury was instructed to return a general verdict which operates as a joint and several verdict against all defendants. *Haslip,* 499 U.S. at 20. The procedural safeguards provided in these instructions are vitiated when the jury is instructed to return a general verdict. Although the jury is instructed to make an individualized assessment of damages based on each defendant's culpability, in accordance with the purposes of punishment and deterrence, a verdict is returned that represents the culpability of all defendants. A general verdict which is wholly composed of non-apportioned punitive damages (as this verdict was) cannot be subjected by any appellate court to the "individualized assessment" required by *Haslip, supra.* Moreover, a general verdict allows the plaintiff to execute any of or all of the verdict against any defendant found liable, including the least culpable. Non-apportionment of punitive damages takes rational decisionmaking out of the hands of the jury and places arbitrary decisionmaking in the hands of the plaintiff. An arbitrary assessment of damages is no longer the possibility feared by this Court in *Honda,* but is a certainty. 512 U.S. ——. The defendants lose the procedural safeguard of an individualized assessment of damages provided by the jury and are subject to paying punitive damages for another defendant's culpability.

In the present case, the jury returned a verdict of $4,000,000.00 against Holy Name of Jesus Medical Center and Dr. John Campbell. After the verdict was returned, Holy Name of Jesus Medical Center and Ms. Williams revealed a pro tanto settlement fixing the hospital's liability at $1,000,000.00. Dr. Campbell is now faced with a $3,000,000.00 judgment in punitive damages. This is a judgment not based on an individualized assessment of Dr. Campbell's culpability by the jury. Accordingly, Dr. Campbell was denied the first procedural safeguard of a proper jury instruction.

The second procedural safeguard set out in *Pacific Mut. Life Ins. Co. v. Haslip* is that post-trial review "insures meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages." *Id.* at 20.[9] Non-apportionment of punitive damages renders impossible meaningful judicial review of such damages at the post-trial stage. In these proceedings the trial court can consider a number of factors to determine whether a verdict is excessive. *Hammond v. City of Gadsden,* 493 So. 2d 1374 (Ala. 1986). This Court enumerated the following factors which the Supreme Court of Alabama had announced could be taken into consideration in determining whether an award of punitive damages was excessive or inadequate: (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the cost of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitiga-

[9] Although the post-trial review and the appellate review of the award of punitive damages against Dr. Campbell did not involve multiple defendants, this was only because Holy Name of Jesus Medical Center entered a pro tanto settlement prior to these stages. It must also be recalled that the verdict which served as a basis for the judgment ultimately entered against Dr. Campbell was in fact a verdict returned against multiple defendants. The issues raised are properly addressed because of the impact joint liability for punitive damages has on the general class of multiple defendants. These issues also impact Dr. Campbell as he could be named as a co-defendant in wrongful death action again. The denial of these procedural safeguards is capable of repetition in other cases involving multiple defendants and must be considered in a constitutional challenge to the imposition of joint liability for punitive damages.

tion; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation. *Haslip,* 499 U.S. at 21-22.

In a post-trial hearing in an action under the Alabama Wrongful Death Act, the trial court must consider these factors as to each individual defendant, but then must somehow apply them to a verdict covering all defendants. How can this be done? It is impossible. The reason that it is impossible is because the trial court is permitted to deny remittitur solely because the award is not deemed excessive in light of the culpable conduct of an unrelated joint tortfeasor. The final result is detrimental to the less culpable defendants who may incur the liability of the most culpable defendant. Without this procedural safeguard, there is no longer "meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages." *Id.* at 20.

The third procedural safeguard noted by this Court in *Haslip* is the review of punitive damage awards by the Alabama Supreme Court. *Id.* This Court stated that this "provides an additional check on the jury's or trial court's discretion." *Id.* Similar to the analysis concerning post-trial review, the Alabama Supreme Court must consider the above mentioned factors as to each individual defendant, but must apply them to a verdict covering all defendants. Because the non-apportionment of punitive damages among multiple defendants under the Alabama Wrongful Death Act eliminates the procedural safeguards outlined by this Court in *Haslip,* this Court should grant review in this case in order to make clear that the due process clause requires individualized assessment of punitive damages among multiple defendants and will not allow a less culpable defendant to be punished for the culpability of another defendant.

III. NON-APPORTIONMENT OF PUNITIVE AWARDS AMONG MULTIPLE DEFENDANTS DENIES EACH AND EVERY DEFENDANT EQUAL PROTECTION OF THE LAWS

The equal protection clause of the Fourteenth Amendment forbids states to deny any person the equal protection of the laws. The thrust of the Fourteenth Amendment is to insure that all similarly situated persons are treated alike. The equal protection clause is violated when a statute makes an invidious or unreasonable classification.

Joint liability for punitive damages creates an unreasonable classification. The first class is defendants that are held individually liable in wrongful death actions. The second class is multiple defendants that are held jointly liable in wrongful death actions. These classifications are unreasonable in that a defendant's damages, when held individually liable, are assessed in direct correlation to his culpability. Contrary to this, a defendant's damages, when multiple defendants are held liable in a wrongful death action, are not in direct correlation to his culpability.

Pursuant to Alabama law, the jury in a wrongful death case is instructed to assess the amount of damages against a defendant in direct relation to the amount of his wrongdoing. *Black Belt Wood Co., Inc. v. Sessions,* 514 So. 2d 1249, 1258 (1986). When an individual defendant is held liable, the verdict returned against the defendant is based solely on that defendant's culpability. A defendant held liable with other defendants in a wrongful death action is treated differently. Damages are not assessed against each defendant based on individual culpability. This creates an arbitrary and unreasonable classification for multiple defendants that are held liable in wrongful death actions and violates their right to equal protection of the laws.

As the Alabama Wrongful Death Act is social legislation, any challenge to this statute's constitutionality based on the equal protection clause requires analysis under the rational basis test. *Hodel v. Indiana,* 452 U.S. 314, 331 (1981). The general test as to whether a statute is constitutional under the rational relation test is whether under any conceivable set of facts, the statute is rationally related to a legitimate state interest. *Lindsley v. Nat'l Carbonic Gas Co.,* 220 U.S. 61 (1911). The purpose of the Alabama Wrongful Death Act is to punish the wrongdoer and to deter similar wrongs in the future in an effort to preserve human life. Dr. Campbell concedes that the preservation of human life is a legitimate state interest.

The Alabama Wrongful Death Act is unconstitutional because joint liability for punitive damages is not rationally related to the statute's purpose. The Alabama Wrongful Death Act requires the jury to return a general verdict and does not allow the jury to return separate verdicts against each defendant based on his culpability. The plaintiff may execute this verdict against the defendants in any manner he wishes. This arbitrary assessment of punitive damages does not serve the underlying policy of punishment and deterrence. Instead, it allows the plaintiff to assess damages based on each defendant's ability to pay a judgment rather than the defendant's culpability. This allows the defendant that is most culpable the opportunity to escape punishment proportionate to the reprehensibility of his acts. In turn, less culpable defendants are disproportionately punished. This creates a situation in which the most culpable defendants can escape punishment for their guilt while others are punished for acts they did not commit. The policy of punishment is clearly not served.

The Alabama Wrongful Death Act also seeks to preserve human life by assessing damages to deter similar wrongs in the future. Damages awarded on this basis can

only deter future wrongs by a defendant, or others similarly situated, if the damages are based on the reprehensibility of the defendant's conduct and are assessed accordingly. If damages are not assessed against a defendant based on the reprehensibility of his conduct, the penalty imposed will not deter the defendant or others from similar conduct in the future. As discussed, non-apportionment fails to assess damages based on a defendant's conduct.

Non-apportionment is unrelated to the policies of punishment and deterrence underlying awards of punitive damages. In turn, the arbitrary classification created by non-apportionment of punitive damages among multiple defendants is not rationally related to the preservation of human life and denies multiple defendants the equal protection guarantees of the Fourteenth Amendment.

In its decision, the Supreme Court of Alabama held that the non-apportionment of punitive damages is rationally related to the preservation of human life and does not violate the equal protection clause. In rendering its decision, the Supreme Court of Alabama has decided a federal question. Whether non-apportionment of punitive damages violates the equal protection clause appears to be a question of first impression which this Court should review. Furthermore, because of the conflict between the procedure at issue here and the procedure approved by other State and Federal courts, this Court should grant review in order to determine whether the non-apportionment of punitive damages violates the equal protection clause.

CONCLUSION

The Court should grant the Writ of Certiorari to review the judgment and opinion of the Supreme Court of Alabama in *Campbell v. Williams,* No. 1920826, entered February 18, 1994.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1993-94

1920826

JOHN H. CAMPBELL, M.D.

v.

SHARLISIA SUTTLE WILLIAMS

Appeal from Etowah Circuit Court
(CV-89-124)

SHORES, JUSTICE.

The defendant doctor appeals from a judgment for the plaintiff entered on a jury verdict in a medical malpractice case seeking damages for the wrongful death of the plaintiff's intestate. The trial court made the following factual findings in its order denying post-judgment relief:

> "This case resulted from the death of Plaintiff's deceased, Ms. Willie Mae Sumpter. On March 9, 1987, while Ms. Sumpter was employed at Gulf States Steel in Gadsden, she suffered second and third degree burns about her face. Molten steel had spewed forth from an ingot mold and struck Ms. Sumpter. She was brought to the emergency room of the Holy Name of Jesus Hospital in Gadsden, where she was examined by an emergency room physician who reported her condition to the Defendant Dr. John H. Campbell. Dr. Campbell admitted her to the hospital as his patient. Dr. Campbell

treated Ms. Sumpter for her burns and monitored her condition. Within a few hours of her admission, Ms. Sumpter's face had become swollen to the point where her eyes were swollen shut and the inside of her mouth was not accessible to examination. Ms. Sumpter was not intubated or examined by use of a fiber-optic bronchoscope.

"In the early morning of March 10 1987, Ms. Sumpter began experiencing respiratory distress and suffered respiratory failure due to the closing off of her airway. Following unsuccessful attempts by technicians to regain her airway by intubation, Dr. Campbell, who had been called by the attending nurse, arrived and performed an emergency tracheostomy which restored Ms. Sumpter's airway. However, Ms. Sumpter's respiratory failure resulted in her lapsing into a coma from which she never recovered. Ms. Sumpter died on April 15, 1987.

"The plaintiff's negligence claim against Dr. Campbell involved his failure to transfer Ms. Sumpter to the burn unit at U.A.B. [the hospital of the University of Alabama at Birmingham]; a course of action required by the Holy Name of Jesus Hospital's protocol for the treatment of major burns patients. The plaintiff's additional claim involved Dr. Campbell's failure to protect Ms. Sumpter's airway by intubation or to examine her upper airway by use of a fiber-optic bronchoscope. The Plaintiff further alleged at trial that Dr. Campbell attempted to conceal certain aspects of Ms. Sumpter's condition by requesting another physician to change that physician's notes and also by preparing a summary which detailed events which did not exist.

"Testimony at trial indicated that Dr. Campbell had another physician, Dr. Richard Gallo, change Dr. Gallo's records from a notation that Ms. Sumpter's respiratory failure occurred following a gradual

closing of her airway, to a notation which indicated that her respiratory failure occurred suddenly. Dr. Campbell's summary of Ms. Sumpter's treatment included the notation that Ms. Sumpter had experienced a sudden coughing spell just before her respiratory failure and that he felt that she suffered airway blockage due to the presence of a mucous plug. The nurse who was with Ms. Sumpter when she began to experience respiratory distress, testified that there was no coughing spell.

"Upon Ms. Sumpter's respiratory distress, described as 'crowing' or fighting for breath, the attending nurse, Carol Fragnoli, contacted Dr. Campbell by telephone and Dr. Campbell ordered an immediate intubation. Attempts at intubation failed due to Ms. Sumpter's swelling and when this was reported to Dr. Campbell, he ordered nurse Fragnoli to send out an emergency code for any physician in the hospital to come and perform an emergency tracheostomy. In response to the emergency code, nurse Fragnoli testified that Dr. [Wilfredo Grana] came from the hospital's emergency room and was advised of Dr. Campbell's order for a tracheostomy, whereupon, according to nurse Fragnoli, Dr. Grana stated that he was not capable of performing a tracheostomy. Dr. Campbell, who had been en route to the hospital as soon as he was contacted, then entered Ms. Sumpter's room and performed the tracheostomy. Dr. Grana was added as a Defendant based upon his alleged involvement.

"Dr. Campbell denied any negligence in his treatment of Ms. Sumpter. Specifically, Dr. Campbell testified that based upon the emergency room examination as reported to him, there was no need to transfer Ms. Sumpter to U.A.B. He further testified that he had successfully treated many burn patients locally and had in this case followed the course of

treatment called for under the circumstances. Dr. Campbell testified that nothing about Ms. Sumpter's condition mandated intubation or merited the risks inherent with intubation or fiber-optic bronchoscopy. Dr. Campbell's testimony presented several factors which indicated that Ms. Sumpter's airway was not closing off before her sudden respiratory failure. Dr. Campbell's position was fully supported by the expert testimony of Dr. William Wood, who, himself, had trained and worked at the U.A.B. burn unit.

"Dr. Campbell's course of treatment was attacked by burn experts, Dr. Robert Demling and Dr. Alan Dimick, head of the U.A.B. burn unit.

"Dr. Grana's testimony was that he did not refuse to perform a tracheostomy and that, indeed, he was not even present on the occasion of Ms. Sumpter's respiratory failure.

"Following all of the testimony in the case and while the Jury was deliberating, Counsel for Dr. Campbell advised the Court on the record and in the presence of all parties, that they had reason to believe that the Plaintiff and Defendant Holy Name of Jesus Hospital had entered into a pro tanto settlement and requested that the Court order those Defendants to reveal such settlement and make its terms known to the Jury. The Court noted that no pro tanto settlement had been presented to the Court and thus refused to order the Plaintiff and Defendant Hospital to reveal any agreement they might have reached.

"The Jury returned a verdict in favor of Dr. Grana but found against the hospital and Dr. Campbell and assessed damages in the amount of $4,000,000.00."

Indeed, while the jury was deliberating, and just moments before it returned its verdict, Ms. Williams and

Holy Name of Jesus Hospital ("Hospital") entered into a pro tanto settlement under which the hospital agreed to pay $1 million in settlement of the claim against it. Giving credit for the $1 million that the hospital had agreed to pay, the trial court entered a $3 million judgment against Dr. Campbell, based on the jury verdict. After the trial court denied his post-judgment motions, Dr. Campbell brought this appeal . We affirm.

Nine issues are raised on appeal: (1) Whether the Alabama Wrongful Death Statute, § 6-5-410, Code of Ala. 1975, is unconstitutional as applied in cases involving multiple defendants. (2) Whether the failure to inform the jury of the pro tanto settlement between the Hospital and the plaintiff so taints the verdict that it must be set aside. (3) Whether the failure of a juror answer or to respond truthfully to *voir dire* questions so prejudiced Dr. Campbell as to require a new trial. (4) Whether the testimony of Dr. Alan Dimick should have been precluded at trial. (5) Whether newly discovered evidence that Dr. Dimick had testified falsely entitled Dr. Campbell to a new trial. (6) Whether the mention of insurance by the plaintiff's counsel during closing arguments mandates a new trial. (7) Whether the trial court properly charged the jury on spoliation of the evidence. (8) Whether the trial court properly charged the jury on the definition of "substantial evidence." (9) Whether the jury's verdict is excessive, so as to require remittitur,

Dr. Campbell challenges the Wrongful Death Act, § 6-5-410, on constitutional grounds, alleging that the Act, as applied in this case, violates his right to a trial by jury, his right to due process of law, and his right to equal protection of the laws under the United States Constitution and the Alabama Constitution.

Alabama has had a wrongful death act since 1852, when the legislature passed an act "to prevent homicides," §§ 1940, 1941, Code of Alabama 1852; *Central of Georgia Ry. v. Ellison*, 199 Ala. 571, 579-80, 75 So.

159, 163 (1916); *Tatum* v. *Schering Corp.*, 523 So.2d 1042 at 1057 (Ala. 1988). An amendment, approved February 21, 1860, was by a later case held to have been expressly made applicable to homicides caused by the "wrongful act, omission or culpable negligence of any officer or agent of any chartered company" (this was the language of § 1941, Code of 1852) as well as to deaths caused by natural persons. The amendment provided in § 2:

> "[W]hen the death of a person is unlawfully caused by another, the personal representative of the deceased may maintain an action against the latter at any time within two years thereafter, and may recover such sum as the jury deem just, and the amount so recovered, shall be distributed as personal property of an intestate is now distributed, and shall not be subject to the payment of the debts of the deceased."

That amendment provided in § 3:

> "That the right of action hereby given shall survive against the personal representative of the person unlawfully causing the death as aforesaid."

Ala. Acts 1859-60, Act No. 46, p. 42; the case interpreting that amendatory act was *Savannah & Memphis R.R. v. Shearer*, 58 Ala. 672, 678 (1877) (noting that although amendatory Act No. 46 repealed § 1938 and § 1939 of the 1852 Code, it did not repeal § 1941 of that Code). In 1872, the Alabama legislature re-enacted the statute to prevent homicides to provide for damages in "such sum as the jury deem just" and to correct a mistake of the codifier. *See* Justice Houston's dissent in *Tatum v. Schering Corp.*, 523 So.2d 1042 at 1056-63 (Ala. 1988).

Justice Stone, writing for this Court in *South & North Alabama R.R. v. Sullivan*, 59 Ala. 272, 279 (1877),

explained the purpose of the "act to prevent homicides," as follows:

> "Commenting on the act 'to prevent homicides' of February 5, 1872, Pamph. Acts 83, we in *Savannah and Memphis Railroad Company v. Shearer*, said, in effect, that the purpose and result of the suit therein provided were not a mere solatium to the wounded feelings of surviving relations, nor compensation for the lost earnings of the slain. We think the statute has a wider air and scope. It is punitive in its purposes. Punitive of the person or corporation by which the wrong is done, to stimulate diligence and to check violence, in order thereby to give greater security to human life; 'to prevent homicides.' And it is none the less punitive because of the direction the statute gives to the damages recovered. The damages, 'tis true, go to the estate of the party slain, and in effect, are compensatory; but this does not change the great purpose of the statute—'to prevent homicides.' Preservation of life—prevention of its destruction by the wrongful acts or omission of another, is the subject of the statute; and all its provisions are but machinery for carrying it into effect.
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> ". . . .
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> "The language of the statute is, 'when the death of a person is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action.' This statute contains no qualifying clauses, limiting its remedial provisions to any class or classes of persons, or excluding any class from its wholesome terms. It employs the word person in its broadest sense, and it would seem that every being falling within that general designation may take shelter under its protecting wings."

The act to prevent homicides was amended in 1886 to read as follows:

> "Action for wrongful act, omission, or negligence causing death. A personal representative may maintain an action, and recover such damages as the jury may assess, for the wrongful act, omission, or negligence of any person or persons, or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, if the testator or intestate could have maintained any action for such wrongful act, omission, or negligence, if it had not caused death; such action shall not abate by the death of the defendant, but may be revived against his personal representative; and may be maintained, though there has not been prosecution, or conviction or acquittal of the defendant for such wrongful act, or omission or negligence; and the damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate; but must be distributed according to the statute of distribution. Such action must be brought within two years from and after the death of the testator or intestate."

§ 2589, Code of Alabama 1886. This Court discussed the changes in the statute from the provision of the recovery of "such sum as the jury deem just" to the recovery of "such damages as the jury may assess" and held that *"the change is purely a verbal one,* and in no sense material." *Richmond & D.R.R. v. Freeman*, 97 Ala. 289, 11 So. 800 (1892) (emphasis in original). Justice McClellan, writing for the Court, explained the damages recoverable under the 1872 act "to prevent homicides":

> "The damages recoverable being punitive and exemplary in all cases under the statute—punitive of the act done and intended by their imposition to stand as an example to deter others from the commission of mortal wrongs or to incite to diligence in the avoidance of fatal casualties—the purpose being the preservation of human life regardless of the pecuniary value of a particular life to next of kin

> under statutes of distributions, the admeasurement of the recovery must be by reference alone, to the quality of the wrongful act or omission, the degree of culpability involved in the doing of the act or in the omission to act as required by the dictates of care and prudence, and without any reference to, or consideration of the loss or injury the act or omission may occasion to the living. Such is the construction given by this court to the act 'to prevent homicide' and as thus construed, it is manifest that the charge set out above is a sound exposition of the elements and measure of damages recoverable under the act unless there has been such modification of the statute in its recent codification as necessitates a different interpretation, or unless the act as thus construed is violative of the organic law as counsel insist."

Richmond & D.R.R. v. Freeman, 97 Ala. at 294, 11 So. at 801. Justice McClellan went on to state that the legislature had not changed the statute since the Court's construction of it, noting that the act of 1872 had been twice re-enacted since the judicial construction of the act in *Shearer, Sullivan*, and *King*.[1]

> "The act of 1872 having been, without modification in any material sense, twice re-enacted since the judicial construction we have been considering was put upon it—in the Code 1876 and again in the Code 1886—and being with that construction a constitutional exercise of the legislative power, it is now to be considered as if the terms and provision, which have been evolved out of it and declared in concrete form by judicial interpretation, were expressly embodied in its letter. This, we think should close the door to the overruling of the cases which put that

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[1] *East Tenn., Va. & Ga. R.R. v. King*, 81 Ala. 177, 183 (1886).

> construction on it, and to the adoption of a different one."

97 Ala. at 296, 11 So. at 802. "[T]he legislature had the power to enact a law such as this one is with the construction this court has given it. . . . It remains for the courts to enforce it as thus constructed and re-enacted. . . ." *Id.*, 97 Ala. at 295, 11 So. at 803.

In *Alabama Great S. R.R. v. Burgess*, 116 Ala. 509, 22 So. 913 (1897), this Court construed the statute that is now § 6-5-410, Ala. Code 1975, which permits the recovery of "such damages as the jury may assess," to provide that only punitive damages are recoverable in an action for wrongful death.

We have long held that nothing in the wrongful death statute authorizes a jury to apportion damages among joint tort-feasors and that the statute does not recognize *degrees* of culpability among joint tort-feasors. *Tatum v. Schering Corp.*, supra, at 1044-45, *citing Bell v. Riley Bus Lines*, 257 Ala. 120, 122-24, 57 So.2d 612, 613-15 (1952). The jury in a wrongful death case must return a single verdict that is based, in part, on the total culpability of all defendants. *Black Belt Wood Co. v. Sessions*, 514 So.2d 1249, 1262 (Ala. 1988).[2] Because the statute

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[2] Dr. Campbell misunderstands *Black Belt Wood* as indicating that the degree of each defendant's culpability must be reflected in the jury's assessment of damages. This, however, is tantamount to apportionment of damages among joint tort-feasors, and thus cannot be the proper interpretation. The source of this confusion is the following quote from *Black Belt Wood*: "The purpose of Alabama's wrongful death statute, of course, has been two-fold: (1) punishment based on the quality of the wrong, and (2) punishment based upon the wrong or *degree of culpability*." *Black Belt Wood Co.*, 514 So.2d at 1262 (emphasis added). Reference to the cases relied on in *Black Belt Wood* for this statement clearly indicates that "degree of culpability" is meant to refer to the propriety of punishing the wrongdoer (i.e., is the wrongdoer sufficienty culpa-

does not recognize individual degrees of culpability among multiple defendants, however, the jury has no discretion to assess damages against each individual defendant, because without recognition of each defendant's degree of culpability the jury would have no basis on which to apportion damages among the defendants.[3] Contrary to the argument advanced by Dr. Campbell, nonapportionment of damages does not interfere with the right to trial by jury, because the jury has the sole discretion to determine in a wrongful death action the total amount of damages that are appropriate to advance the public interest in the preservation of life. It is within the power of the legislature to authorize juries to make this determination.

The United States Supreme Court, in reviewing our Wrongful Death Act, stated:

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ble?), and not to the individual amount of responsibility that each defendant contributed toward the total harm done:

> "In a wrongful death action brought under Code 1975, § 6-5-410, the only damages recoverable are punitive in nature, and the amount thereof is determined by the gravity of the wrong done, the propriety of punishing the wrongdoer, and the need for deterring others from committing the same or similar wrongful conduct."

Deaton, Inc. v. Burroughs, 456 So.2d 771, 776 (Ala. 1984), *citing Estes Health Care Centers, Inc. v. Bannerman*, 411 So.2d 109, 112 (Ala. 1982).

[3] Prosser, in his treatise on torts, indicates that apportionment should never be allowed in a wrongful death action:

> "Certain results, by their very nature, are obviously incapable of any reasonable or practical division. Death is such a result, and . . . [n]o ingenuity can suggest anything more than a purely arbitrary apportionment of such harm. Where two or more causes combine to produce such a single result, incapable of any reasonable division, each [responsible party] may be a substantial factor in bringing about the loss, and if so, each is charged with [liability for] all of it."

W. Page Keeton et al., *Prosser and Keeton on Torts*, at 347 (5th ed. 1984) (footnotes omitted).

> "As interpreted by the state court, the aim of the present statute is to strike at the evil of the negligent destruction of human life by imposing liability, regardless of fault, upon those who are in some substantial measure in a position to prevent it. We cannot say that it is beyond the power of the legislature, in effecting such a change in the common law rules, to attempt to preserve human life by: making homicide expensive."

Louis Pizitz Dry Goods Co. v. Yeldell, 274 U.S. 112, 115-17 (1927). The purpose of the law, to protect the lives of Alabama citizens, is a legitimate state interest. *Alabama Power Co. v. Turner*, 575 So.2d 551 at 556 (1991); *cert. denied*, —— U.S. ——, 111 S.Ct. 2260 (1991). The nonapportionment of damages among multiple defendants bears a rational relationship to the goal sought to be attained by the statute, the prevention of homicide.

> "[I]n a wrongful death action filed against joint tort-feasors, a plaintiff is entitled to a single recovery that will represent the total amount of punitive damages the jury may access for the wrongful death. This total recovery assessed, in an amount determined by the jury as punishment for the homicide, cannot be apportioned among joint tort-feasors."

Tatum, supra, 523 So.2d at 1045.

We note that Alabama has historically treated actions resulting in death differently from actions causing lesser injury. The "enormity of the wrong" justifies the difference in treatment. The Alabama legislature, beginning in 1852, first sought "to prevent homicides" by the enactment of a wrongful death statute. By allowing punitive damages to be assessed against multiple defendants in wrongful death actions without apportionment based upon the degree of culpability of each, the legislature is "attempt[ing] to preserve human life by making homicide

expensive." *Louis Pizitz Dry Goods Co.*, supra, 274 U.S. at 116. Participation in actions causing the death of a human being, even if slight, can result in liability without regard to the degree of culpability, and this result, the legislature believes, will lead to greater diligence in avoiding the loss of life. The legislature has authorized the jury to ascertain an amount of damages appropriate to the goal sought to be achieved—preservation of life because of the enormity of the wrong, the uniqueness of the injury, and the finality of death. Where the enormous wrong results from the combined actions of several tortfeasors, the relative culpability of multiple defendants is only one factor that the jury may consider. Because the policy of this state is to regard human life as being beyond measure in terms of dollars, the jury must disregard the decedent's wealth or lack of wealth, it must disregard the decedent's potential for accumulating great wealth or lack of potential to accumulate wealth; and it must disregard his or her talents and education, or lack of them, as well as his or her station in life. The jury's consideration of the "enormity of the wrong" includes assessing the finality of death, the propriety of punishing the wrongdoer or wrongdoers, whether the death could have been prevented, and, if so, the lack of difficulty that would have been involved in preventing the death, as well as the public's interest in deterring others from committing the same or similar wrongful conduct. *Deaton, Inc. v. Burroughs,* supra, 456 So.2d at 776.

Dr. Campbell contends that, because the jury is prohibited by law in this case from rendering separate verdicts against each defendant, the jury was unable to assess his individual liability for the death of Ms. Sumpter, and, thus, the $3 million verdict entered against him constitutes more than his fair share of the total liability for her death and is disproportionate to his wrongdoing. He argues that the nonapportionment rule, as applied to him in this case, violates his constitutional rights.

This case went to the jury against three defendants: the Hospital, Dr. Wilfredo Grana, and Dr. Campbell. The jury returned a verdict in favor of Dr. Grana, and against the Hospital and Dr. Campbell. The case was submitted to the jury against the Hospital on three theories: vicarious liability for the alleged negligence of Dr. Grana in failing to perform a tracheostomy; independent negligence for failing to ensure that Dr. Grana was qualified to perform a tracheostomy; and vicarious liability for the alleged negligence of the nurses in failing to enforce the Hospital's policy regarding the transfer of burn patients. The case was submitted to the jury against Dr. Campbell on two separate negligence claims: that he deviated from the standard of care by not transferring the patient to the burn unit at U.A.B., as required by the Hospital's policy regarding treatment of major burn patients, by failing to examine the patient's airway by use of a fiberoptic bronchoscope, and by failing to intubate the patient.

The jury found in favor of Dr. Grana; therefore its verdict against the Hospital was based either upon the jury's finding that the nurses were negligent in not enforcing the Hospital's policy concerning transfer of burn patients, or upon the Hospital's failure to ensure that Dr. Grana was qualified to perform a tracheostomy. Dr. Campbell's argument that he is bearing a disproportionate share of liability is not persuasive under the facts of this case. The nonapportionment of punitive damages among multiple defendants in wrongful death cases bears a rational relationship to a legitimate state interest—the prevention of homicide—and it thus does not violate constitutional guarantees. *See Alabama Power Co. v. Turner*, supra, 575 So.2d at 556; *Killough v. Jahandarfard*, 578 So.2d 1041, 1044 (Ala. 1991).[4]

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[4] These cases both held that the exception of wrongful death actions from the $250,000 cap on punitive damages imposed under § 6-11-21 (held unconstitutional in *Henderson v. Alabama Power Co.*, [Ms. 1901875, June 25, 1993] —— So.2d —— (Ala. 1993)),

The Alabama legislature has had over a century to change the law if it determined that this Court wrongly construed the Wrongful Death Act. It has not changed the law despite impassioned dissents suggesting that it do so. *See Carter v. City of Birmingham*, 444 So.2d 373 (Ala. 1983), *cert. denied*, 467 U.S. 1211 (1984) (Jones, J., dissenting); *Tatum v. Schering*, supra, at 1046-47 (Jones, J., dissenting) and at 1047-63 (Houston, J., dissenting). Any change in the interpretation of the statute should be left to the legislature. *Tatum*, supra, at 1044-45; *Black Belt Wood Co. v. Sessions*, supra, at 1263. Accordingly, we hold that the trial court correctly charged the jury on its role in this case, and we reject the appellant's constitutional agreements.

As we have shown, Alabama has historically permitted juries to assess only punitive damages in wrongful death cases and has not allowed juries to apportion those damages among joint tort-feasors. The legislature has repeatedly refused to alter either of these practices, and its approval of this Court's construction of the Wrongful Death Act convinces us that we should not now change it.

Dr. Campbell next contends that the trial court's failure to advise the jury of the pro tanto settlement between the plaintiff and the Hospital so tainted the jury's final deliberations as to result in a verdict that was "illegal, inappropriate, a sham, and inherently unfair to Dr. Campbell." The record indicates that, after the jury had reached a verdict but immediately before the jury delivered its verdict, Dr. Campbell's attorney asked the trial judge if any pro tanto settlement had been reached between the plaintiff and one of the codefendants, stating that Dr. Campbell "would have the right to plead and [prove]" such a settlement to the jury. The judge replied by saying that no pro tanto settlement had been pre-

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did not violate a wrongful-death defendant's equal protection rights because the exception bore a rational relationship to the legitimate state interest in preventing homicides.

sented to the court. The plaintiff's attorney failed to disclose that any settlement had been reached; the attorney said the final terms of the settlement were not established at that time.[5]

It is settled law that a person injured by joint tort-feasors may release one or more pro tanto. The tort-feasors may then plead the release as a bar to that amount paid by the released tort-feasor or may place it in evidence, showing payment for the injury up to the amount shown in the release. *Bucyrus-Erie Co. v. Von Haden*, 416 So.2d 699, 702 (Ala. 1982), citing *Anderson v. Kemp*, 279 Ala. 321, 184 So.2d 832 (1966). This is referred to as the "doctrine of *Bucyrus-Erie*." *Tatum v. Schering Corp.*, supra, at 1045. In *Hardman v. Freeman*, 337 So.2d 325 (Ala. 1976), we made it clear that a joint tort-feasor is entitled to post-judgment relief based on a pro tanto settlement and release entered by the other joint tort-feasors, despite the fact that he was unable to plead and prove the pro tanto settlement at trial because the terms of the release were not then final. *Id.* at 327. The relief to which the joint tort-feasor is entitled is a set-off of the amount of the pro tanto settlement against the amount of the verdict.

Dr. Campbell argues that, because he was unable to plead the pro tanto settlement to the jury, the verdict is invalid. We find no error here. Although under the doctrine of *Bucyrus-Erie* a defendant would be entitled to plead the release, in this case the defendant did not have the opportunity to place the pro tanto settlement before the jury; therefore, the trial judge simply allowed a set-off

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[5] The plaintiff's contention was, apparently, that no firm settlement existed because the amount of the settlement was dependent on the jury's verdict. Dr. Campbell could not object to the trial court's refusal to inform the jury of the settlement because the court was not informed of the existence of any settlement about which he could instruct the jury. Therefore, Dr. Campbell's counsel did all that was possible in order to preserve this issue for appeal.

of the amount of the pro tanto settlement against the amount of the general verdict in lieu of the settlement being pleaded before the jury. Dr. Campbell received the relief to which he would have been entitled if the pro tanto settlement had been known. Because the trial court gave Dr. Campbell all the relief to which he was entitled when it set off the $1 million pro tanto settlement against Dr. Campbell's liability, we find nothing inherently inappropriate, unfair, or illegal about the verdict against Dr. Campbell or the propriety of the pro tanto settlement.[6] *Williams v. Colquett*, 272 Ala. 577, 133 So.2d 364 (1961); *Hardman v. Freeman*, supra, at 327; *Bucyrus-Erie Co. v. Von Haden*, supra, at 702; *Anderson v. Kemp*, supra; *Tatum v. Schering Corp.*, supra, at 1045-46.

Dr. Campbell next argues that the failure of juror Bobby Ray Wooten to answer or to respond truthfully to certain questions during *voir dire* so prejudiced him as to require a new trial.

> "The proper inquiry on a motion for a new trial based on improper or nonexistent responses to *voir dire* questions is whether the response, or lack of response, resulted in probable prejudice to the movant. Not every failure of a prospective juror to respond correctly to a *voir dire* question will entitle the losing party to a new trial.
>
> "The determination of whether the complaining party was prejudiced by a juror's failure to answer *voir dire* questions is a matter within the discretion of the trial court and will not be reversed unless the court has abused its discretion. Some of the factors that this Court has approved for using to determine

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[6] In *Bucyrus-Erie* and *Tatum v. Schering Corp.*, in lieu of allowing the defendant to place the pro tanto settlements into evidence, the trial court informed the jury of the settlements and instructed it to subtract the figure from the full amount of damages, if any, to be awarded by the plaintiff.

> whether there was probable prejudice include: 'temporal remoteness of the matter inquired about, the ambiguity of the question propounded, the prospective juror's inadvertence or willfulness in falsifying or failing to answer, the failure of a juror to recollect, and the materiality of the matter inquired about.' "

Union Mortgage Co. v. Barlow, 595 So.2d 1335, 1342-43 (Ala. 1992), *cert. denied*, —— U.S. ——, 113 S. Ct. 301 (1992) (quoting *Freeman v. Hall*, 286 Ala. 161, 167, 238 So.2d 330, 336 (1972)) (other citations omitted). The trial court, in its order denying Dr. Campbell's motion for a judgment notwithstanding the verdict, a new trial, or a remittitur, extensively addressed these factors in determining that juror Wooten's failure to answer or to respond truthfully was not prejudicial to Dr. Campbell.[7] After carefully reviewing the record, particularly juror Wooten's post-trial affidavit explaining his failure to answer the questions, and the trial judge's order denying a new trial, we conclude that the trial judge did not abuse his discretion in finding that Dr. Campbell was not prejudiced by juror Wooten's failure to respond.

We next consider whether the trial court abused its discretion in allowing Dr. Alan Dimick, head of the burn unit at U. A. B. Hospital, to testify as the plaintiff's expert witness on the medical standard of care for burn victims, given that he had earlier been consulted by Dr. Campbell's attorneys. The record reflects that when the plaintiff first tried to use Dr. Dimick as her expert witness, the trial court granted Dr. Campbell's motion to preclude Dr. Dimick's testimony. Later, the plaintiff moved the court to reconsider its order precluding the use of Dr. Dimick as the plaintiff's expert witness, and

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[7] The trial court's analysis indicates that the failure to answer or to respond truthfully was due to inadvertence based on an honest misunderstanding of an ambiguous question, as well as on temporal remoteness and a failure to recollect.

attached Dr. Dimick's affidavit in support of the motion. Dr. Dimick's affidavit states in pertinent part:

> "It is true that I was given a copy of Lillie Mae Sumpter's medical chart to review and that I had a meeting with the attorney for Dr. Campbell to discuss my thoughts on the care that was given Mrs. Sumpter. At that time I was not given any additional information which was not contained in the medical chart, nor was I told of any potential defenses or theories of defense which might be raised at trial. The conversation instead centered around my very strong opinion that the case clearly represented substandard care on the part of Dr. Campbell in his treatment of Mrs. Sumpter. Outside of being compensated for my time, I had no further meeting with Dr. Campbell's attorneys concerning this case. At no time did I agree to participate as an expert for Dr. Campbell."

The trial court changed its ruling in light of the fact that Dr. Campbell's counsel had already consulted, but had not retained, the head doctors at both of Alabama's major burn treatment centers, Dr. Dimick and Dr. Arnold Luterman. The trial judge restricted Dr. Dimick's testimony to what was contained within Ms. Sumpter's medical records and precluded him from mentioning that he had been contacted by Dr. Campbell's attorneys. In his order, the trial judge stated, "[I]t appears to this Court that under the unique circumstances of this case, this Court should no longer preclude the testimony of Dr. Alan Dimick, provided his testimony is confined to his opinions based on the medical records in this case."

"The question of whether or not a particular witness will be allowed to testify as an expert is largely discretionary with the trial court, whose decision will not be disturbed on appeal except for palpable abuse." *Dowden v. State*, 610 So.2d 1256, 1257 (Ala. Cr. App. 1992), *quoting* C. Gamble, *McElroy's Alabama Evidence*

§ 127.01(5)(b) (4th ed. 1991); *Ellingwood v. Stevens*, 564 So.2d 932, 935 (Ala. 1990). After carefully reviewing the record and the trial court's orders on the issue of precluding Dr. Dimick's testimony, we conclude that, under the unique circumstances of this case, the trial court did not abuse its discretion in allowing Dr. Dimick to testify as the plaintiff's expert witness.

Dr. Campbell further contends he is due a new trial on the grounds of newly discovered evidence. Dr. Dimick testified on behalf of the plaintiff that Ms. Sumpter should have been intubated or examined with a fiber optic brochoscope, and that she would have received this treatment had she been transferred to the U. A. B. burn unit. Dr. Campbell argues that he has newly discovered evidence indicating that one of Dr. Dimick's own burn patients was not intubated or examined with a bronchoscope upon, or soon after, his arrival at U. A. B. The patient, who, like Ms. Sumpter, had suffered second- and third-degree burns to the face, died of respiratory failure eight days before the trial of this case.

The trial court, in its order denying a new trial based on this newly discovered evidence, determined that this evidence was not of such a nature that a different verdict probably would result if a new trial were granted. The court noted that the newly discovered evidence would have served merely to impeach Dr. Dimick's testimony, and that another expert had also testified for the plaintiff regarding the proper standard of care.[8]

> "In order for a movant to be entitled to a new trial on the ground of newly discovered evidence, the movant must demonstrate that the evidence:

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[8] The trial court also noted that there were differences between the conditions of the two burn victims and that Dr. Dimick had testified that a treating physician should be allowed to use his judgment in determining how to treat a burn victim, based on the circumstances of the case, and that intubation or bronchoscopy was not always required treatment for a burn victim.

> " '1) was discovered after trial;
>
> " '2) could not have been discovered with the exercise of due diligence before trial;
>
> " '3) is material to the issue;
>
> " '4) is not merely cumulative or impeaching; and
>
> " '5) is of such a nature that a different verdict than that already obtained probably would result if a new trial were granted.'
>
> "*Welch v. Jones*, 470 So.2d 1103, 1112 (Ala. 1985).
>
> "The determination of whether to grant or deny a new trial is for the trial judge, and an order granting or denying a motion for new trial on the basis of newly discovered evidence will not be disturbed on appeal, unless it appears that the trial court abused its discretion. *Gilmer v. Salter*, 285 Ala. 671, 235 So.2d 813 (1970)."

Talley v. Kellogg Co., 546 So.2d 385, 388 (Ala. 1989).

We conclude, after carefully reviewing the record and the trial court's order denying a new trial, that the newly discovered evidence would have served only to impeach Dr. Dimick's testimony as to the proper standard of care. Because the plaintiff's other expert witness also testified as to the proper standard of care, we cannot say that a new trial probably would result in a different verdict. Therefore, the trial court did not abuse its discretion in holding that the newly discovered evidence provided insufficient grounds for a new trial.

Dr. Campbell contends that the mention of insurance during closing argument by the plaintiff's attorney mandates a new trial, and he contends that the mention violated the court's order granting a motion in limine so as to prohibit "all parties, witnesses and attorneys . . . from

referring in any manner to professional liability insurance."

During closing argument, the following exchange occurred:

> "MR. CROWDER [plaintiff's attorney]: Instead of this being a medical malpractice case with a prominent white doctor, and hospital here, assume that this was a—this had been a trucking accident, that a truck driver with defective brakes has been going 65 miles an hour in a rainstorm, and had rear ended Lillie Mae Sumpter, and had put her in a coma for five weeks, and then, she died.
>
> "And assume that the insurance adjuster came out to the driver, and said, I want you to change your driving log; instead of showing on the log where you got it that you were driving in the rain for 30 minutes, I want you to change it and show that you suddenly came into this rainstorm. And then, I want you to change your driving log to show that—
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> "MR. ELLIOTT [attorney for one of the defendants]: Excuse me, Mr. Crowder—
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> "MR. CROWDER: —to show that you were—
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> "MR. FLORIE [attorney for the defendant Dr. Campbell]: Excuse me, Mr. Crowder, this is all repetitive—this is entirely an improper argument, we object to it, there is a different—the law is entirely different as it applies to a physician by statute, Mr. Crowder knows that. We object to it, and ask for instructions, and move for a mistrial.
>
> "MR. ELLIOTT: We—
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> "MR. CROWDER: Your honor, I'm giving them an analogy, an analogous situation. The law would be—
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> "MR. FLORIE: —Proper analogy, wholly improper, on the basis of everything he just said—

"MR. ELLIOTT: —inference based on facts in the case, and that alone, and that is not a legitimate inference based on the facts of this case—

". . . .

"THE COURT: Gentlemen, address the bench with your remarks. Go ahead.

"MR. ELLIOTT: That is not a legitimate inference from the evidence in the case, it's argumentative, prejudicial, we object to it, and we move for a mistrial.

"THE COURT: Motion for a mistrial will be denied.

"Ladies and gentlemen, this action is a negligence case involving the standard of care of a physician and/or a hospital, and the analogy may not be pertinent, but it is the closing argument.

"Go ahead.

"MR. CROWDER: Thank you, Your Honor."

There is no indication from this exchange that defense counsel was objecting to the mention of insurance, unless Mr. Elliott's assertion that the analogy objected to was "prejudicial" was intended to imply that it was prejudicial because of the mention of insurance. Immediately after closing argument, however, and before the trial judge charged the jury, defense counsel reasserted their motion for a mistrial, including in support of their motion, a reference to the plaintiff's mention of insurance during closing argument:

"THE COURT: All right, we are out of the presence of the jury. Is there something for the record?

"MR. FLORIE: Yes, sir, on behalf of Dr. Campbell, Your Honor, immediately upon the close of Mr. Crowder's argument we would renew—reassert our

motion for a mistrial, on these grounds, separately and severally.

"Mr. Crowder undertook to make an improper and illegal argument posed on an analogy as to a type of tort action for which the law in Alabama imposes an entirely different standard. The duty imposed on a doctor under the Medical Liability Act applicable to this case is a different standard, different duty, and [is] imposed by statute, entirely separate and apart upon a trucking company [sic]. He made reference by analogy to the Department of Transportation regulations, which are . . . nowise analogous or applicable to Dr. Campbell in this case. He—a blatant violation of the Court's motion in limine to reference insurance and insurance adjusters, and changing on insurance adjusters and he did in such a manner so as to make it impossible for any defendant in this case to speak in the presence of the jury without risk of overwhelming prejudice, and to address the question of insurance, Your Honor ruled on that in the motion in limine, was an intentional affront to that ruling, and we move for a mistrial.

"MR. ELLIOTT: I join in the motion, I adopt the grounds stated by Mr. Florie.

". . . .

"THE COURT: Gentlemen, your motion for a mistrial is denied."

We must determine whether this mention of insurance was sufficiently prejudicial to require a mistrial or a new trial.

"The issue of whether to grant a mistrial generally rests within the sound discretion of the trial court. The reason for the rule is well advanced in *Burnett v. Bledsoe*, 276 Ala. 139, 159 So.2d 841 (1964), where the Court explained:

> " 'The cases where insurance is mentioned in civil actions during the trial are numerous but the determining factor is whether or not a remark concerning insurance is prejudicial. The governing rule with reference to all remarks of counsel before the jury is thus stated in *Birmingham Electric Co. v. Perkins,* 249 Ala. 426, 430, 31 So.2d 640, 642:
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> > " ' "The trial court was present and was an eyewitness to all of the proceedings and in overruling the defendant's motions in effect found that the remarks were not prejudicial to the defendant. Therefore the action of the trial court in denying the motions for mistrial and in overruling the motions for new trials will not be disturbed by this court unless it affirmatively appears from the entire record that the statements involved were [probably] prejudicial. . . .' "
>
> ". . . .
>
> "A review of the instances in which liability insurance was injected into a civil case discloses that the trial court's focus is upon prejudice, *i.e.,* was the defendant prejudiced to such an extent that the improper influence of the subject of insurance was ineradicable from the minds of the jurors?"

Thompson-Weinman & Co. v. Robinson, 386 So.2d 409, 411 (Ala. 1980) (citations omitted).

> "In reversing a denial of a new trial, this Court has stated: '[W]ith reference to an argument made by counsel *emphasizing the existence of insurance carried by his opponent covering the transaction,* this Court has taken the position that the influence is ineradicable.' *Thorne v. Parrish,* 265 Ala. 193, 195, 90 So.2d 781, 783 (1956) (citations omitted). The

> principle that reference to indemnification or insurance of an opposing party is highly prejudicial and grounds for a mistrial or a new trial is firmly established."

Cook v. Anderson, 512 So.2d 1310, 1311 (Ala. 1987) (emphasis added) (citations omitted); *Williston v. Ard*, 611 So.2d 274, 278 (Ala. 1992). We held in *Cook* that a new trial was required because the plaintiff's attorney made a statement referring to the defendants' insurance policy and that statement "improperly suggested to the jury that the individual defendants would be indemnified for any liability imposed upon them in the case." 512 So.2d at 1312. We do not see how the unfortunate reference by the plaintiff's counsel to an insurance adjuster in an analogy made during closing argument would have suggested to the jury that Dr. Campbell had professional liability insurance or that he would be indemnified for any liability imposed upon him. Moreover, Dr. Campbell's attorney did not specifically request a curative instruction on insurance, and, if he did intend to do so, he did not object when the trial court failed to instruct the jury about insurance when it instructed the jury about counsel's analogy to a truck driver. After carefully reviewing the entire record, we cannot say that the mention of insurance probably prejudiced Dr. Campbell. Therefore, we conclude that the trial court did not abuse its discretion in refusing to grant a mistrial or a new trial because of the mention of insurance.

We next look to see whether the trial court erred in instructing the jury on spoliation of the evidence over Dr. Campbell's objection that the charge was not supported by the evidence or any reasonable inference therefrom.[9] Dr. Campbell cites in support of his contention

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[9] The court charged the jury as follows:

"Ladies and gentlemen, spoliation or an attempt to express [suppress?] material evidence, by a party or parties to a suit,

Shannon v. Hollingsworth, 291 Ala. 159, 279 So.2d 428 (1973), which states that "it is error to hypothetically instruct a jury on a state of facts when there is no evidence to establish them." 291 Ala. at 165, 279 So.2d at 434.

The trial court, in its order denying Dr. Campbell's motion for a judgment notwithstanding the verdict, or a new trial, or a remittitur, stated:

> "As to the involvement of Dr. Campbell in a possible cover-up or concealment, the Court must disagree with Dr. Campbell's assertion that there was no evidence presented of such cover up or concealment. Evidence was presented that Dr. Campbell asked another physician, Dr. Richard Gallo, to correct Dr. Gallo's notes which had indicated that Ms. Sumpter suffered a gradual closing-off of her airway. Dr. Campbell asked Dr. Gallo to change the notation so as to reflect that Ms. Sumpter suffered a sudden onset of the closing-off of her airway. [R.T. 959-61.] Additionally, Dr. Campbell's written report stated that Ms. Sumpter had respiratory arrest following a coughing spell. This was in contrast to the testimony of the nurse on duty who denied any coughing spell. [R.T. 106-08.] While this evidence may not indicate an attempt to conceal facts about Ms. Sumpter's treatment, this Court cannot with assurance say that the jury did not consider that concealment existed and punished accordingly."

The trial court did not err in charging the jury on spoliation of the evidence, because there was evidence in the record to support the giving of the charge.

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favorable to the adversary is sufficient foundation for inferences of their guilt or negligence. The fact may be established by direct or circumstantial evidence, and proof is sufficient if from the facts and circumstances adduced it can be reasonably inferred." (T.R. 1666.)

Dr. Campbell next contends that the trial court erred in instructing the jury on the definition of "substantial evidence" as that term is used in the Alabama Medical Liability Act of 1987, Ala. Code 1975, § 6-5-542(5). He argues that the jury should have been given the definition of "substantial evidence" as it appears in the General Tort Reform Act, § 12-21-12(d).

The Medical Liability Act of 1987 applies to all causes of action against health care providers that accrue after June 11, 1987. *Clements v. Dr. John Alvin Steward, P.C.*, 595 So.2d 858, 862 (Ala. 1992). Because Ms. Sumpter died in April 1987, the cause of action for her wrongful death accrued before the Medical Liability Act of 1987 became applicable. However, this Court has held that the difference between the definition of "substantial evidence" given in § 6-5-542(5) and the definition of the same term given in § 12-21-12(d) is a "difference without distinction," *Clements*, supra, 595 So.2d at 862. Therefore, any error was harmless. Ala. R. App. P. 45; *Industrial Risk Insurers v. Garlock Equip. Co.*, 576 So.2d 652 (Ala. 1991).

Finally, Dr. Campbell argues that the amount of the jury verdict for which he may be held personally liable would financially destroy him and is so large as to be excessive and therefore to require a remittitur. The trial court, in its order denying the request for remittitur, addressed the issue of excessiveness, applying the factors set forth in *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986), and *Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala. 1989).

> "Because the purpose of punitive damages is not to compensate the plaintiff but to punish the wrongdoer and to deter the wrongdoer and others from committing similar wrongs in the future, the proper amount of punitive damages rests largely within the jury's discretion. However, although punitive damages need bear no particular relationship to actual

> damages, they, nonetheless, must not exceed an amount that will accomplish society's goals of punishment and deterrence. *Green Oil Co. v. Hornsby*, supra."

Wilson v. Dukona Corp., N.V., 547 So.2d 70, 73 (Ala. 1989).

The trial court addressed the *Hammon-Green Oil* factors, using a four-step approach. First, the court analyzed the impact of the verdict on Dr. Campbell, noting that, after deducting from the $4 million verdict the $1 million settlement between the Hospital and the plaintiff and the $1 million in insurance coverage held by Dr. Campbell, Dr. Campbell would be personally liable for $2 million. Dr. Campbell's financial statements submitted to the court indicated that his net worth in 1992 was over $1 million and that his annual income exceeded $525,000. The trial court, stating in its order that "the purpose of punitive damages is not to destroy but rather to meet societal goals [of punishment and deterrence]," concluded that the impact of the verdict on Dr. Campbell was not sufficient to overcome the presumption of correctness in favor of the jury's verdict.

The court next addressed Dr. Campbell's conduct, viewing his professional treatment of Ms. Sumpter separately from his conduct concerning any alleged cover up or concealment of the circumstances surrounding Ms. Sumpter's death. The court noted that Dr. Campbell undertook to be diligent in treating Ms. Sumpter, and it did not consider his conduct in treating her to be reprehensible conduct. However, the court noted that the jury could have considered Dr. Campbell's role in any alleged cover up or concealment and punished him accordingly by its award of punitive damages.

The court then noted that no mitigating factors were presented for consideration. Finally, the court compared the verdict in this case with other verdicts awarding puni-

tive damages. Although the verdict in this case was the highest verdict returned in a medical malpractice wrongful death case in Etowah County, the court noted that, in light of the verdicts awarded in other punitive damages cases, the verdict against Dr. Campbell was not so high as to require remittitur. The court concluded that "[u]pon consideration of the factors relevant to remittitur, the Court finds that the Defendant has not overcome the presumption of correctness of the jury's verdict," and denied a remittitur.

From a review of the trial court's findings and from our independent review of the evidence, applying the *Green Oil* standards, we conclude that the $4 million punitive damages award in this case does not exceed an amount necessary to punish Dr. Campbell for his action and to deter him and others from committing similar acts in the future. Therefore, we affirm the trial court's denial of a remittitur.

AFFIRMED.

Hornby, C. J., and Kennedy, Ingram, and Cook, JJ., concur.

Maddox and Houston, JJ., dissent.

MADDOX, JUSTICE (dissenting).

This case was initially assigned to me, and I reached the same conclusion that the majority reaches on every issue except one: the failure of the trial court to inform the jury of the pro tanto settlement. The majority addresses this issue as follows:

> "Dr. Campbell argues that, because he was unable to plead the pro tanto settlement to the jury, the verdict is invalid. We find no error here. Although under the doctrine of *Bucyrus-Erie,* a defendant would be entitled to plead the release, in this case the defendant did not have the opportunity to place the pro tanto settlement before the jury; therefore, the trial judge simply allowed a set-off of the amount of the pro tanto settlement against the amount of the general verdict in lieu of the settlement being pleaded before the jury. Dr. Campbell received the relief to which he would have been entitled if the pro tanto settlement had been known. Because the trial court gave Dr. Campbell all the relief to which he was entitled when it set off the $1 million pro tanto settlement against Dr. Campbell's liability, we find nothing inherently inappropriate, unfair, or illegal about the verdict against Dr. Campbell or the propriety of the pro tanto settlement. *Williams v. Colquett,* 272 Ala. 577, 133 So. 2d 364 (1961); *Hardman v. Freeman,* [337 So. 2d] at 327; *Bucyrus-Erie Co. v. Von Haden,* [416 So. 2d] at 702; *Anderson v. Kemp,* [279 Ala. 321, 184 So. 2d 832 (1966)]; *Tatum v. Schering Corp.,* [523 So. 2d] at 1045-46."

—— So. 2d at ——.

The Court stated in *Tatum v. Schering Corp.,* 523 So. 2d 1042, 1045 (Ala. 1988):

> "[A] person injured by joint tort-feasors may accept partial satisfaction and release one or more pro tanto

> and proceed against the other; however, the tort-feasors not so released may plead the release as a bar to that amount paid by the released tort-feasor(s) or may place it in evidence to show payment for the injury up to the amount shown in the release."

See also, Bucyrus-Erie Co. v. Von Haden, 416 So. 2d 699, 702 (Ala. 1982) ("In lieu of allowing [the] defendant to place the *pro tanto* settlements into evidence, the trial court properly informed the jury of the total amount of the settlements . . . ."). Thus, a defendant has a right to have the jury informed of the fact of a pro tanto settlement between the plaintiff and another defendant. The fact that in this case the plaintiff and the Hospital waited until the close of the evidence to agree to the settlement should not affect Dr. Campbell's right to have the jury informed of the settlement. As long as the settlement is reached before a verdict is returned, the trial court should inform the jury of the settlement and instruct it accordingly. To hold otherwise would allow the settling parties to wait until the close of evidence to settle and thus avoid having the jury notified of the pro tanto settlement, thereby obstructing the nonsettling defendant's right to inform the jury of the settlement. Furthermore, the failure of the settling parties to disclose a settlement agreement to the non-settling defendant could violate the rules governing discovery. *See* Rule 26(e)(2), Ala. R. Civ. P.

The Alabama Wrongful Death Statute, § 6-5-410, Ala. Code 1975, has a dual purpose of "punishment based on the quality of the wrong" and "punishment based upon the wrong or degree of culpability." *Black Belt Wood Co. v. Sessions*, 514 So. 2d 1249, 1262 (Ala. 1986). If this purpose is to be carried out, the jury must be informed of a codefendant's pro tanto settlement entered into before the verdict is returned, because otherwise a non-settling defendant could be punished unfairly. I do not express any opinion as to whether the nondisclosure of the settlement to the jury in this case prejudiced Dr.

Campbell. I would hold only that he had a right to present it to the jury, that it could have significantly affected the verdict, and that the trial court erred in not informing the jury of the pro tanto settlement. Therefore, I dissent from the Court's opinion on this issue and from the result reached in this case.

HOUSTON, JUSTICE (dissenting).

Punitive Damages and a Single Defendant

I agree with Justice Scalia, in his observation that the majority of the United States Supreme Court in *TXO Production Corp. v. Alliance Resources Corp.*, —— U.S. ——, 113 S.Ct. 2711, 2727, 125 L.Ed.2d 366 (1993), approved procedures for upholding the constitutionality of punitive damages that were "far less detailed and restricted than those upheld in [*Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991)]" (Scalia, J., with Thomas, J., concurring in the judgment). We no longer have to worry about the relationship of the amount of compensatory damages to the amount of punitive damages, which never made sense to me, for it did not foster the purpose of punishing and deterring. I also agree with Justice Kennedy that the United States Constitution "does not concern itself with dollar amounts, ratios, or the quirks of juries in specific jurisdictions." *TXO*, —— U.S. —— 113 S.Ct. at 2724 (Kennedy, J., concurring in part and concurring in the judgment). A plurality of the United States Supreme Court takes the position that there exists "a substantive due process right that punitive damages be reasonable." *TXO*, —— U.S. at ——, 113 S.Ct. at 2726. I believe that under *Haslip*, as explained by *TXO*, if a jury is instructed to consider the gravity of the defendant's wrong and the need to deter similar wrongful conduct and the jury's determination is reviewed by trial and appellate courts to ensure that the jury verdict is reasonable, a defendant has received all the process the defendant is due, procedurally and substantively.

Punitive Damages and Two or More Defendants

However, in my opinion, the procedure for assessing punitive damages in Alabama, when there is more than one defendant, violates the guarantee of procedural due

process under the United States and Alabama Constitutions, regardless of the amount of the award. "[T]o punish the guilty beyond their guilt is not different from punishment of the innocent, and it cannot be done in a manner consistent with ordinary notions of justice." Dan B. Dobbs, "Ending Punishment in 'Punitive' Damages: Deterrence-Measured Remedies," 40 Ala.L.Rev. 831, 854 (1989). When we do not punish based upon the particular wrong of a particular defendant, that defendant does not receive due process; and government is not protecting the citizen in the enjoyment of his property, when there is no life, liberty, or property interest of a plaintiff or any other citizen involved. To me, this violates "the sole object and only legitimate end of government." Art. I, § 35, Alabama Constitution of 1901.

Punitive Damages, Wrongful Death, and Two or More Defendants

Under the majority's interpretation of the Alabama Wrongful Death Act, death is an indivisible injury, requiring a single verdict, fixing a lump sum regardless of the (individual) culpability of tort-feasors.

When confronted head-on with the argument that any settlement by a personal representative with any tort-feasor satisfies the societal interest of punishing for that death and prohibits the personal representative from recovering from any other tort-feasor, the majority of this Court in *Tatum v. Schering Corp.*, 523 So.2d 1042 (Ala. 1988), held that it did not, since "the remaining defendant would be entitled to plead the release in bar to the amount paid by the released tort-feasors, or that defendant could place it in evidence to show payment for the injury [death] up to the amount shown in the releases." The majority added, "Under the doctrine of *Bucyrus-Erie Co.* [*v. Von Haden*, 416 So.2d 699 (Ala. 1982)], the court, in lieu of allowing the defendant to place the *pro-tanto* settlements into evidence, could instruct the jury

on the total amount of the settlements, as was done in *Bucyrus-Erie*." 523 So.2d at 1045-46.

If, in this case, the $4 million judgment is allowed to stand and $3 million of that is assessed against Dr. Campbell, the plaintiff and a defendant will have been permitted to apportion a nonapportionable verdict, which *Tatum* permits only a jury to do. Therefore, I must dissent.

By not apportioning punitive damages in a wrongful death action, we have focused on the result (the death) of the tort-feasor's wrongful acts, omissions, or negligence, rather than on the wrongful acts, omissions, or negligence of the tort-feasor. Yet, juries are instructed that "The amount of damages should be directly related to the amount of wrongdoing on the part of the defendants." *Alabama Pattern Jury Instructions: Civil* § 11.18.

Juries must then assess the wrongdoing of each defendant and combine that assessment into a finding of the total wrongdoing that results in death. After that is done, the jury must then decide if it, in its uncontrollable discretion, desires to award punitive damages (this fact concerns me, because I would think death is a compensable injury). If the jury wishes to award damages, then it must arrive at one sum that is directly related to the combined amount of wrongdoing on the part of the defendants. This sum stands, no matter how small it may be (this fact, too, concerns me, because I think death is a compensable injury). However, if the sum is challenged as being excessive, then there must be a *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986), hearing and the trial court must test the punitive award by the factors set out in *Hammond*; *Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala. 1989); and Ala. Code 1975, § 6-11-23(b). If there is an appeal and excessiveness of the award is an issue, then this Court must test the punitive award by the factors set out in *Green Oil* and Ala. Code 1975, § 6-11-24(b). This provides sufficient constitu-

tional protection for a single defendant. *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). However, what if a defendant or some defendants, but fewer than all defendants, settle with a plaintiff in a wrongful death case and the nonsettling defendant or defendants are prohibited from pleading the pro tanto release in bar to the amount paid by the settling defendants, and the Court refuses to instruct the jury on the total amount of the settlements? Then, in my opinion, the jury punishes for the combined wrongdoing, without knowing that a dollar amount has been fixed for the wrongdoing of some, but not all, of the defendants. The jury must know what amount was paid for the wrongdoing of the settling defendant or defendants, or else the jury may punish the nonsettling defendant or defendants for the wrongdoing of the settling defendant; to do so would, in my opinion, violate the nonsettling defendant's rights under §§ 13 and 35 of the Alabama Constitution.

The mere fact that this Court prohibits apportionment of punitive damages among wrongdoers, insofar as recovering punitive damages from joint tort-feasors is concerned (which fact causes me some constitutional concerns), did not seem to concern this Court, when in *Tatum* it, in effect, directed that a jury must apportion punitive damages to overcome the argument that death is an indivisible injury and that settlement with one or more tort-feasors satisfied the societal interest of civilly punishing for that indivisible injury. In *Tatum*, I realized that it was impossible to apply legal reasoning to our judicially construed wrongful death statute, and, in my dissent, I begged for a return to bedrock in interpreting the wrongful death statute. 523 So.2d at 1047-63.

Because I cannot apply legal reasoning to the judicial interpretation of the damages awarded under our wrongful death statute, as a pragmatist I would affirm upon the condition that the plaintiff and Dr. Campbell agree to a remittitur of $2 million. That way, the hospital and Dr.

Campbell would each pay $1 million. If neither the plaintiff nor Dr. Campbell accepted that, then I would order the case retried and in a retrial of the claim against Dr. Campbell the settlement between the hospital and the plaintiff would be admissible.

APPENDIX B

IN THE CIRCUIT COURT
OF ETOWAH COUNTY, ALABAMA

Case No. CV-89-124-DWS

SHARLISIA SUTTLE WILLIAMS, as Administratrix of the Estate of LILLIE MAE SUTTLE SUMPTER, Deceased, *et al.*,

Plaintiff(s),

vs.

JOHN H. CAMPBELL, M.D.,

Defendant(s).

ORDER

This matter comes before the Court on Defendant Dr. John H. Campbell's Motion for Judgment Notwithstanding the Verdict, New Trial, and remittitur. Upon due consideration of each motion along with briefs and argument of Counsel; the Court finds as follows:

On September 23, 1992, a jury verdict was returned in favor of the Plaintiff and against Holy Name of Jesus Hospital and Dr. John H. Campbell in the amount of $4,000,000.00. Dr. Campbell has filed post-trial motions setting out his grounds for Judgment Notwithstanding the Verdict, New Trial, and remittitur. This Order will first address the issues presented as a basis for a Judgment Notwithstanding the Verdict, New Trial and then consider the issue of remittitur.

FACTUAL BACKGROUND

This case resulted from the death of Plaintiff's deceased, Ms. Willie Mae Sumpter. On March 9, 1987,

while Ms. Sumpter was employed at Gulf States Steel in Gadsden, she suffered second and third degree burns about her face. Molten steel had spewed forth from an ingot mold and struck Ms. Sumpter. She was brought to the emergency room of the Holy Name of Jesus Hospital in Gadsden, where she was examined by an emergency room physician who reported her condition to the Defendant Dr. John H. Campbell. Dr. Campbell admitted her to the hospital as his patient. Dr. Campbell treated Ms. Sumpter for her burns and monitored her condition. Within a few hours of her admission, Ms. Sumpter's face had become swollen to the point where her eyes were swollen shut and the inside of her mouth was not accessible to examination. Ms. Sumpter was not intubated or examined by use of a fiber-optic bronchoscope.

In the early morning of March 10, 1987, Ms. Sumpter began experiencing respiratory distress and suffered respiratory failure due to the closing off of her airway. Following unsuccessful attempts by technicians to regain her airway by intubation, Dr. Campbell, who had been called by the attending nurse, arrived and performed an emergency tracheostomy which restored Ms. Sumpter's airway. However, Ms. Sumpter's respiratory failure resulted in her lapsing into a coma from which she never recovered. Ms. Sumpter died on April 15, 1987.

The Plaintiff's negligence claim against Dr. Campbell involved his failure to transfer Ms. Sumpter to the burn unit at U.A.B.; a course of action required by the Holy Name of Jesus Hospital's protocol for the treatment of major burns patients. The Plaintiff's additional claim involved Dr. Campbell's failure to protect Ms. Sumpter's airway by intubation or to examine her upper airway by use of a fiber-optic bronchoscope. The Plaintiff further alleged at trial that Dr. Campbell attempted to conceal certain aspects of Ms. Sumpter's condition by requesting another physician to change that physician's notes and also by preparing a summary which detailed events which did not exist.

Testimony at trial indicated that Dr. Campbell had another physician, Dr. Richard Gallo, change Dr. Gallo's records from a notation that Ms. Sumpter's respiratory failure occurred following a gradual closing of her airway, to a notation which indicated that her respiratory failure occurred suddenly. Dr. Campbell's summary of Ms. Sumpter's treatment included the notation that Ms. Sumpter had experienced a sudden coughing spell just before her respiratory failure and that he felt that she suffered airway blockage due to the presence of a mucous plug. The nurse who was with Ms. Sumpter when she began to experience respiratory distress, testified that there was no coughing spell.

Upon Ms. Sumpter's respiratory distress, described as "crowing" or fighting for breath, the attending nurse, Carol Fragnoli, contacted Dr. Campbell by telephone and Dr. Campbell ordered an immediate intubation. Attempts at intubation failed due to Ms. Sumpter's swelling and when this was reported to Dr. Campbell, he ordered nurse Fragnoli to send out an emergency code for any physician in the hospital to come and perform an emergency tracheostomy. In response to the emergency code, nurse Fragnoli testified that Dr. Alfredo Granna came from the hospitals' emergency room and was advised of Dr. Campbell's order for a tracheostomy, whereupon, according to nurse Fragnoli, Dr. Granna stated that he was not capable of performing a tracheostomy. Dr. Campbell, who has been en route to the hospital as soon as he was contacted, then entered Ms. Sumpter's room and performed the tracheostomy. Dr. Granna was added as a Defendant based upon his alleged involvement.

Dr. Campbell denied any negligence in his treatment of Ms. Sumpter. Specifically, Dr. Campbell testified that based upon the emergency room examination as reported to him, there was no need to transfer Ms. Sumpter to U.A.B. He further testified that he had successfully treated many burn patients locally and had in this case

followed the course of treatment called for under the circumstances. Dr. Campbell testified that nothing about Ms. Sumpter's condition mandated intubation or merited the risks inherent with intubation or fiber-optic bronchoscopy. Dr. Campbell's testimony presented several factors which indicated that Ms. Sumpter's airway was not closing off before her sudden respiratory failure. Dr. Campbell's position was fully supported by the expert testimony of Dr. William Wood, who, himself, had trained and worked at the U.A.B. burn unit.

Dr. Campbell's course of treatment was attacked by burn experts, Dr. Robert Demling and Dr. Allan Dimick, head of the U.A.B. burn unit.

Dr. Granna's testimony was that he did not refuse to perform a tracheostomy and that indeed, he was not even present on the occasion of Ms. Sumpter's respiratory failure.

Following all of the testimony in the case and while the Jury was deliberating, Counsel for Dr. Campbell advised the Court on the record and in the presence of all parties, that they had reason to believe that the Plaintiff and Defendant Holy Name of Jesus Hospital had entered into a pro tanto settlement and requested that the Court order those Defendants to reveal such settlement and make its terms known to the Jury. The Court noted that no pro tanto settlement had been presented to the Court and thus refused to order the Plaintiff and Defendant Hospital to reveal any agreement they might have reached.

The Jury returned a verdict in favor of Dr. Granna but found against the hospital and Dr. Campbell and assessed damages in the amount of $4,000,000.00.

JUDGMENT NOTWITHSTANDING THE VERDICT AND NEW TRIAL ISSUES

A. *Newly Discovered Evidence*

Dr. Campbell urges the Court to grant a new trial on the basis of newly discovered evidence that an expert witness at trial, Dr. Alan Dimick, gave false testimony which directly affected the outcome of the trial. At trial Dr. Dimick, who is in charge of the burn unit at U.A.B., testified as to the standard of care required of Dr. Campbell. Part of that standard of care, according to Dr. Dimick, would have been for Dr. Campbell to have transferred the deceased to the burn unit at U.A.B. where she would have been treated differently than she was trated by Dr. Campbell.

Specifically Dr. Dimick testified that she would have been intubated or examined by use of a fiber-optic bronchoscope. In support of his post-trial motions, Dr. Campbell has presented evidence of Dr. Dimick's treatment of his own burn patient who was treated without intubation or fiber-optic bronchoscopy. Dr. Campbell points out that this patient, who also died of respiratory failure just days before Dr. Dimick's testimony in the instant trial, also suffered second and third degree burns. Dr. Campbell argues that Dr. Dimick not only intentionally misrepresented to the jury that the standard of care required inturbation or fiber-optic bronchoscopy, he also told the jury that had Ms. Sumpter been transferred to the U.A.B. burn unit, she would have received such treatment. Dr. Campbell insists that in light of the treatment Dr. Dimick administered to his own patient under similar circumstances, that his testimony against Dr. Campbell was false and misleading.

Plaintiff in opposition to Dr. Campbell's position concerning newly discovered evidence points out that Dr. Dimick did not testify that all burn patients with second and third degree burns are always intubated or broncho-

scoped at U.A.B., but that in his opinion Ms. Sumpter should have been and would have been if she had been so transferred. Plaintiff contradicts Dr. Campbell's interpretation of Dr. Dimick's testimony and points out that Dr. Dimick told the jury that any surgeon must be allowed to use his judgment in choosing the best method of treatment for his patient under the particular circumstances of the case. That Dr. Dimick did not tell the jury that under every circumstance, the standard of care was universal, but that under the particular circumstances of Ms. Sumpter's case. Dr. Campbell fell below the standard of care.

This Court has reviewed the testimony of Dr. Dimick both at trial and through post-trial depositions. Dr. Dimick's trial testimony was impressive to the Court and no doubt had great impact on the jury. Although the Plaintiff offered the testimony of another well-qualified expert, Dr. Robert Demling, who also testified that Dr. Campbell fell below the standard of care, the Court agrees with Dr. Campbell that Dr. Dimick's testimony was more significant. Thus it is essential to determine if Dr. Dimick's testimony was so false and misleading as to have led to a verdict which cannot stand. Stated another way, is Dr. Campbell's newly discovered evidence of such a nature that a different verdict would result if an new trial were granted?

Upon careful analysis of Dr. Dimick's testimony this Court finds that the newly discovered evidence presented by Dr. Campbell does not reveal that his trial testimony was intentionally false and misleading. A careful comparison of Dr. Dimick's testimony at trial concerning the treatment of Ms. Sumpter and his testimony via post-trial deposition concerning the treatment of his own patient, a Mr. Jimmy Latham, indicates marked differences in the two patients. Dr. Dimick, in the face of the record of his treatment of his patient, Mr. Latham, still maintains that his testimony against Dr. Campbell re-

mains valid. Dr. Dimick still maintains that under the circumstances of Ms. Sumpter's case, she should have been transferred to U.A.B. and had she been, she would have been intubated or bronchoscoped.

This Court cannot say that had the jury heard the details of Dr. Dimick's treatment of his own burn patient who also was not intubated nor bronchoscoped, his explanation for the difference in treatment would not have been accepted. At best, the evidence of his treatment of Mr. Latham would appear to be impeachment. It was also noted that the standard of care for the treatment of Ms. Sumpter was the subject of extensive testimony by another expert, Dr. Robert Demling and it certainly may be assumed that the jury considered his testimony along with Dr. Dimick's.

Upon due consideration of the criteria which would afford Dr. Campbell a new trial due to newly discovered evidence, this Court finds that such criteria has not been met.

B. *Juror's failure to answer questions on voir dire*

Juror Bobby Wooten failed to answer that he had been a Defendant in a lawsuit. He also failed to respond to the question of whether any juror knew attorney Curtis Wright or Mr. Wright's former law associate, Mr. David Livingston or his current partner, Mr. William Russell. Mr. Wooten had been a Defendant in a lawsuit filed by David Livingston and is now having his wages attached by garnishment as a result of a consent judgment entered in 1987.

Dr. Campbell urges that he was prejudiced by Mr. Wooten's failure to respond to the question asked on voir dire. Mr. Wooten's service on the jury after failure to respond to voir dire questions does not ipso facto prove that Dr. Campbell was prejudiced. An analysis of the question or questions asked of Mr. Wooten as well as a review of the matter inquired about is necessary.

The questions asked but not responded to by Mr. Wooten which are the basis for Dr. Campbell's motion are as follows:

Question by Mr. Crowder, an attorney for Plaintiff:

> Page 60 of voir dire examination:
>
> "MR. CROWDER: Has any member of the—any members of the venire ever been a defendant? That is, have you ever been sued or had claims brought against you because of personal injury or wrongful death, either you or a member of your immediate family?"
>
> Page 62 of voir dire examination:
>
> "MR. CONNERLY: And Mr. Curtis Wright, who is up here in the witness box temporarily. His partner is William Russell here in Gadsden. Do you know either of them?"
>
> Page 91 of voir dire examination:
>
> "MR. CROWDER: I forgot to qualify, Mr. Howard Warren, Jim Turnbach, David Livingston, and Lee Roberts, all practice in Gadsden. Any of you know them?"

Mr. Wooten failed to respond to either question. Certainly if Juror Wooten was aware that the question by Attorney Crowder as to any juror having been a defendant in a personal injury or death case, also included having been a defendant in a subrogation claim, his failure to respond was probably prejudicial to Dr. Campbell. In Mr. Wooten's post-trial affidavit, he states that he did not consider himself a defendant in a lawsuit since he had had no trial before a judge and jury. According to his affidavit, his understanding of what constituted being a defendant in a lawsuit, necessarily meant "going to court and having a trial with a judge and jury" (affidavit of Juror Bobby Wooten). Mr. Wooten's affidavit coupled with the fact that the prospective jurors were being ques-

tioned in a death case presents a valid basis for finding that his failure to respond was inadvertent. The question concerning being a defendant in a lawsuit was somewhat ambiguous to a layman. Mr. Wooten points out in his affidavit, that if he had been asked in such a way as to make him cognizant that the subrogation lawsuit made him a defendant for the purposes of the question, he would have spoken up.

The second pertinent question to Mr. Wooten involved his knowledge of any relationship with attorney Curtis Wright or William Russell or David Livingston. Mr. Wooten states that he was not acquainted with Messrs. Wright, Russell or Livingston. A review of Mr. Curtis Wright's affidavit indicates that Mr. Wright also had no knowledge of Mr. Wooten and under the circumstances of a subrogation suit filed by an junior associate, there would be no basis for Mr. Wright to be acquainted with Mr. Wooten. By the same token, Mr. Wooten's sworn affidavit has validity, as there is no reason for Mr. Wooten to know Mr. Wright. As to being acquainted with attorney David Livingston, who has not practiced law with Mr. Wright for some time, Mr. Wooten's knowledge of Mr. Livingston could have simply involved a name on a pleading filed some five (5) years before. The lawsuit documents furnished by Dr. Campbell along with Curtis Wright's affidavit, indicate that Mr. Wooten was represented by Counsel who entered into a consent judgment on his behalf. Nothing furnished to the Court, indicates a meeting between Mr. Wooten and Mr. Livingston which would provide evidence that Mr. Wooten's affidavit is false.

Mr. Curtis Wright's affidavit states Mr. Wooten's consent judgment required monthly payments and when Mr. Wooten failed to make his monthly payments, his wages were attached by garnishment. The records furnished the Court indicate that Mr. William D. Russell, law partner of Mr. Wright filed the garnishment. Again, nothing in

the documents pertaining to the lawsuit indicate an acquaintance between Mr. Wooten and Mr. Russell.

Based on the affidavits of Attorney Curtis Wright and Juror Bobby Wooten, and the documents concerning Juror Wooten's lawsuit, this Court does not find that Dr. Campbell was prejudiced or probably prejudiced by Juror Wooten's failure to respond to questions on voir dire or by serving as a juror.

C—Injection of insurance by Plaintiff during closing argument.

D—Failure of Court to advise the jury of the settlement between Plaintiff and another Defendant.

E-F—Jury charges.

G—Apportionment of damages among joint tort/feasors.

This Order has specifically addressed those issues which have arisen after the jury's verdict, since the Court feels that the parties are entitled to an Order which speaks directly to issues which the Court has not previously addressed for the record. The additional issues designated as C through G are issues which arose during the course of the trial and thus the record reflects the actions of the Court. Upon a careful review of the record and consideration of the post-trial briefs of the parties the Court finds no basis in those issues for the granting of a Judgment Notwithstanding the Verdict or New Trial.

Remittitur

Careful consideration has been given to Dr. Campbell's request for a remittitur. This being a wrongful death case, the damages are punitive only; the purpose being to punish and to deter. This Court having found that a Judgment Notwithstanding the Verdict or New Trial is not appropriate, the issue of excessiveness will be addressed in light of the factors set out in *Hammond v.*

City of Gadsden, 493 So. 2d 1374 (Ala. 1986) and *Green Oil Company v. Hornsby*, 539 So. 2d 218 (Ala. 1989). The *Hammond/Green* factors will be addressed in the four-step approach approved by the Supreme Court in *Principal Financial Group v. Thomas*, 585 So. 2d 816 (Ala. 1991).

A—*Impact*

Because the other remaining Defendant, Holy Name of Jesus Hospital settled with the Plaintiff before the jury's verdict for the sum of $1,000,000.00, the remaining $3,000,000.00 of the jury's verdict falls to Dr. Campbell for payment. Dr. Campbell has insurance coverage of $1,000,000.00 thus leaving $2,000,000.00 for which he would be personally liable.

In Dr. Campbell's answers to interrogatories dated December 11, 1992, he answered that his net worth was between $400,000 and $500,000. However, Dr. Campbell's financial statements, which were produced after the Court's Order, indicate a net worth as of November 1992, of $1,030,000.00. The Plaintiff urges the Court that remittitur should be denied due to what Plaintiff characterizes as an attempt to deceive this Court by understating net worth in an effort to avoid the imposition of the jury's verdict. This Court is not prepared to consider the apparent disparity between interrogatory answers and financial statements as evidence of deliberate deceit. This Court is mindful of that "the purpose of punitive damages is not to destroy but rather to meet societal goals" *Wilson v. Dukona Corp. N.V.*, 547 So. 2d 70 (Ala. 1989). However, based upon the net worth of Dr. Campbell as reflected by the series of financial statements furnished as well as evidence of an annual income exceeding $525,000.00, the Court cannot conclude that the presumption of correctness of the jury's verdict is rebutted so as to require remittitur due to impact alone.

In considering the impact due to the amount of the jury's verdict, the Plaintiff urges the Court to take into

consideration the likelihood that Dr. Campbell will be able to successfully indemnify himself through a bad faith lawsuit against his own insurance carrier. The Plaintiff correctly points out that Dr. Campbell's personal attorneys, Messrs. George Ford and Gullatte Hunter, made every effort to prevail upon Dr. Campbell's insurance carrier to settle the lawsuit for the limits of his coverage, being $1,000,000.00. The deposition of Attorney Gullatte Hunter and the exhibits attached thereto, show a very vigorous and repeated effort to have the insurance carrier settle before the jury verdict. Plaintiff makes a very compelling argument that the likelihood of Dr. Campbell recovering the excess judgment against his insurance carrier, should be considered by this Court as a factor along with the *Hammond/Green Oil* factors.

While this Court has not observed an excess judgment lawsuit better postured than the suit Dr. Campbell has stated he intends to file, this factor is not considered herein in connection with impact. This Court is aware that the issue of the possibility of an excessive judgment recovery (bad faith lawsuit) has been certified to the Supreme Court, only the factors of *Hammond/Green Oil* are considered pending a ruling by the high Court.

B—*Defendant's conduct*

In addressing the issue of Dr. Campbell's conduct, it is felt that his professional treatment of Ms. Sumpter should be viewed separately from his conduct concerning an alleged cover-up or concealment.

It is undisputed that Dr. Campbell undertook to treat Ms. Sumpter in a diligent manner. Upon her entrance to the hospital emergency room, Dr. Campbell admitted her to the hospital based upon an examination and report by the emergency room physician. Dr. Campbell was faithful to visit Ms. Sumpter and to monitor her condition. The Plaintiff's charge that he failed to transfer Ms. Sumpter to Birmingham or to intubate and/or use a fiber-

optic bronchoscope does not, in the opinion of this Court, constitute reprehensible conduct.

As to the involvement of Dr. Campbell in a possible cover-up or concealment, the Court must disagree with Dr. Campbell's assertion that there was no evidence presented of such cover-up or concealment. Evidence was presented that Dr. Campbell asked another physician, Dr. Richard Gallo to correct Dr. Gallo's notes which had indicated that Ms. Sumpter suffered a gradual closing-off of her airway. Dr. Campbell asked Dr. Gallo to change that notation so as to reflect that Ms. Sumpter suffered a sudden onset of the closing-off of her airway. Additionally, Dr. Campbell's written report stated that Ms. Sumpter had respiratory arrest following a coughing spell. This was in contrast to the testimony of the nurse on duty who denied any coughing spell. While this evidence may not indicate an attempt to conceal facts about Ms. Sumpter's treatment, this Court cannot with assurance say that the jury did not consider that concealment existed and punished accordingly.

C—*Mitigating factors*

No mitigating factors, such as outlined by the Supreme Court, have been presented for consideration. No evidence of criminal sanctions or further civil actions have been presented.

D—*Comparison with other cases*

As Dr. Campbell points out, the verdict in this case is the highest verdict returned in a medical malpractice wrongful death case in this county. However, a list of other cases listed by the Plaintiff indicate that the verdict in this case is not so high as to require remittitur simply because it is the highest for this county.

Upon consideration of the factors relevant to remittitur, the Court finds that the Defendant has not overcome the

presumption of correctness of the jury's verdict and therefore the Motion for remittitur is due to be denied.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the defendant's Motion for Judgment Notwithstanding the Verdict, Motion for New Trial and remittitur are hereby denied.

Done this 19th day of February, 1993.

/s/ Donald W. Stewart
DONALD W. STEWART
Circuit Judge

APPENDIX C

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA

APRIL 8, 1994

1920826

JOHN H. CAMPBELL, M.D.

v.

SHARLISIA SUTTLE WILLIAMS
(Etowah: CV-89-124-DWS)

NOTICE

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

SHORES, J.—HORNSBY, CJ., KENNEDY, INGRAM AND COOK, JJ., CONCUR. MADDOX AND HOUSTON, JJ., DISSENT.

(2)

Supreme Court, U.S.
FILED
AUG 31 1994
OFFICE OF THE CLERK

No. 94-47

In The

Supreme Court of the United States

October Term, 1994

JOHN H. CAMPBELL, M.D.,

Petitioner,

versus

SHARLISIA SUTTLE WILLIAMS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Alabama's non-apportionment rule, which is designed to promote the state's social policy of protecting human life by holding all culpable tortfeasors liable for the full measure of damages assessed by the jury, violated petitioner's due process or equal protection rights where petitioner was provided the full panoply of post-judgment protections approved in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991).

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Factual Background

This petition arises out of an Alabama state court judgment against the petitioner, Dr. John H. Campbell, for causing the wrongful death of respondent's decedent, Ms. Lillie Mae Sumpter. On March 9, 1987, Ms. Sumpter suffered second and third degree burns on her face, mouth, and neck when 2850°F molten steel spewed on her during the course of her employment. Ms. Sumpter was immediately taken to the Holy Name of Jesus Hospital, which was located near her job site in Gadsden, Alabama. Pet. at 1a.

The Holy Name of Jesus Hospital is not a specialized burn treatment facility; however, like many hospitals, it had specific written policies and procedures for dealing with major burn patients. Pet. at 2a. Those procedures required that patients with severe burns in the vicinity of the mouth (such as Ms. Sumpter) be transferred to a specialized burn treatment facility, such as the one located at the hospital at the University of Alabama at Birmingham (U.A.B.) in Birmingham, Alabama. Pet. at 2a. The hospital's procedures were consistent with the standard of care in the national medical community which also required the transfer of major burn patients. Trial Transcript [hereinafter Tr.] at 657. Despite the fact that both the standard of care and the hospital's policies required Ms. Sumpter's transfer to U.A.B., Dr. Campbell, who is a general surgeon, not a burn specialist, decided to admit Ms. Sumpter as his patient. Pet. at 1a; Tr. at 418.

The standard of care for patients who suffer severe burns in the vicinity of the mouth requires an examination of the patient's airway with a fiber-optic bronchoscope to determine whether the patient has suffered inhalation burns inside of her mouth and trachea. Tr. at 652. Inhalation burns are particularly common when the patient suffers facial burns because the air inhaled by the patient (while being burned) is often extremely hot. Tr. at 651. If the fiber-optic bronchoscopy reveals burns in the patient's airway, the standard of care requires that the patient be intubated to prevent the swelling from the burns inside the mouth and trachea from closing off the patient's airway. Tr. at 658. Despite the severity of Ms. Sumpter's burns in the vicinity of her mouth and the extreme heat generated by the molten steel that burned

her, Dr. Campbell did not examine Ms. Sumpter's airway with a fiber-optic bronchoscope, nor did he intubate her. Pet. at 2a.

Within hours of her arrival at the hospital, Ms. Sumpter's eyes and lips had swollen shut. Pet. at 2a. Despite Ms. Sumpter's swelling and the obvious possibility that her airway was closing off, Dr. Campbell, once again, did not order that Ms. Sumpter be intubated, nor did he conduct the fiber-optic bronchoscopy to determine whether such swelling was in fact occurring. Pet. at 2a.

As Ms. Sumpter's swelling worsened, she began to experience respiratory distress, having such difficulty breathing that she was "gasping" for air. Pet. at 2a; Tr. at 104-05. With each breath, Ms. Sumpter made audible "wailing" or "crowing" sounds in an attempt to get air into her lungs. Pet. at 3a. On several occasions, Ms. Sumpter had such difficulty breathing that her body "thrashed" about on her bed. Tr. at 114.

When Ms. Sumpter began having trouble breathing, the attending nurse made several attempts to contact Dr. Campbell to inform him of Ms. Sumpter's condition and to request orders about the proper treatment. Pet. at 3a. When she finally reached Dr. Campbell on the telephone, he ordered that Ms. Sumpter be immediately intubated. Pet. at 3a. However, the severe swelling in her mouth, tongue, and trachea made intubation impossible. Pet. at 3a. At that point, Dr. Campbell ordered that an emergency tracheostomy be performed. Pet. at 3a. According to the nurse, Dr. Wilfredo Grana, the emergency room physician on duty, was summoned to Ms. Sumpter's room to perform the emergency tracheostomy. Pet. at 3a. According to Dr. Grana, however, he was not present at

the hospital at the time of Ms. Sumpter's respiratory distress. Pet. at 4a. In any event, no one performed an emergency tracheostomy until after Ms. Sumpter suffered complete respiratory arrest. Pet. at 2a. Ms. Sumpter stopped breathing at 7:11 a.m. on March 10, 1987, a little over 21 hours after she was admitted to the hospital. Tr. at 132-33. Although she was eventually revived through emergency resuscitative measures, she lapsed into a coma from which she died on April 15, 1987. Pet. at 2a. The testimony at trial revealed that, with proper treatment, Ms. Sumpter would have survived her burns with the need for only cosmetic surgery. Tr. at 330.

After Ms. Sumpter was revived, but while she still remained in a coma, Dr. Campbell, apparently realizing the terrible blunder he had committed, persuaded another doctor to *change* his records to reflect that Ms. Sumpter's respiratory arrest was due to a "sudden coughing spell" which had dislodged a mucous plug which in turn blocked her airway. Pet. at 2a-3a. In fact, this was the description Dr. Campbell contrived when he wrote his own summary of the events which led to Ms. Sumpter's respiratory arrest. Pet. at 3a. However, the attending nurse, who was with Ms. Sumpter during her *entire* respiratory distress, testified that no such coughing spell ever occurred. Pet. at 3a.

COURSE OF PROCEEDINGS BELOW

On February 17, 1989, Sharlisia Suttle Williams ("Ms. Williams"), as administratrix of the estate of Ms. Sumpter,

filed suit against Dr. Campbell, Dr. Grana, and the hospital. After hearing eight days of evidence, the jury returned a verdict finding Dr. Campbell and the hospital jointly liable for Ms. Sumpter's death. Pet. at 4a. The jury returned a verdict in favor of Dr. Grana, apparently believing his testimony that he was not present at the time Ms. Sumpter suffered respiratory distress. Pet. at 4a. The Alabama Supreme Court explained the jury's verdict as follows:

> "This case went to the jury against three defendants: the Hospital, Dr. Wilfredo Grana, and Dr. Campbell. The jury returned a verdict in favor of Dr. Grana, and against the Hospital and Dr. Campbell. The case was submitted to the jury against the Hospital on three theories: vicarious liability for the alleged negligence of Dr. Grana in failing to perform a tracheostomy; independent negligence for failing to ensure that Dr. Grana was qualified to perform a tracheostomy; and vicarious liability for the alleged negligence of the nurses in failing to enforce the Hospital's policy regarding the transfer of burn patients. The case was submitted to the jury against Dr. Campbell on [three] separate negligence claims: that he deviated from the standard of care by not transferring the patient to the burn unit at U.A.B., as required by the Hospital's policy regarding treatment of major burn patients, by failing to examine the patient's airway by use of a fiber-optic bronchoscope, and by failing to intubate the patient.
>
> "The jury found in favor of Dr. Grana; therefore its verdict against the Hospital was based either upon the jury's finding that the nurses were negligent in not enforcing the Hospital's policy concerning transfer of burn

> patients, or upon the Hospital's failure to ensure that Dr. Grana was qualified to perform a tracheostomy."

Pet. at 14a.

Pursuant to Alabama's wrongful death statute, which permits the assessment of punitive damages only, the jury returned a joint verdict against both Dr. Campbell and the hospital for $4 million. Pet. at 4a. During the jury's deliberations, however, the hospital settled with Ms. Williams on the basis of a hand-written "high low" agreement, which was contingent upon the jury's finding of liability against the hospital.[1] Pet. at 5a. Since the jury found the hospital jointly liable with Dr. Campbell and assessed damages in excess of $1 million, the hospital paid $1 million under the settlement agreement, leaving a $3 million balance against Dr. Campbell alone. Pet. at 5a. The trial court entered judgment against Dr. Campbell for $3 million.

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[1] The settlement agreement read as follows:

"(1) Verdict Against Hospital & Campbell – cap of 1 million on Hospital. Floor of 750,000 – regardless of amount of verdict.

"(2) Verdict Against Hospital without Campbell –

A) Anything under 750,000 – Hospital pays 750,000.

B) Anything over 750,000 – Hospital pays actual amount up to *1 million*.

"[(3)] Verdict in favor of Hospital – Hospital pays 700,000 – Seven hundred thousand – .

"[(4)] *Mistrial* – No settlement."

Following trial, Dr. Campbell filed a motion for a new trial and/or remittitur of the $3 million judgment entered against him.[2] Pet. at 39a. At Dr. Campbell's request, the trial court conducted a hearing during which it entertained Dr. Campbell's arguments concerning the alleged excessiveness of the jury's verdict and the alleged unfairness of requiring him to pay the balance of the punitive judgment which was entered against both him and the hospital. Pet. at App. B. After the hearing, during which Dr. Campbell submitted false sworn testimony about his annual income and net worth, the trial court entered a lengthy order finding that the remaining amount of the jury's verdict was fully justified given the severity of Dr. Campbell's misconduct, his ability to pay the judgment, his efforts to cover-up his wrongdoing, and the need to deter others in the future. Pet. at 48a-52a.

Dr. Campbell then appealed the trial court's judgment to the Alabama Supreme Court, which conducted a *de novo* review of the $3 million judgment. Pet. at App. A. In a 30-page opinion, the Alabama Supreme Court affirmed the judgment in its entirety, independently concluding that the $3 million judgment was not excessive given the specific facts and circumstances of this case.

Importantly, a large portion of the Alabama Supreme Court's opinion is dedicated to the issue of the constitutionality of Alabama's non-apportionment rule. Pet. at

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[2] Dr. Campbell did not, and has not, challenged the sufficiency of the evidence.

5a-15a. After thoroughly reviewing the history and purpose of Alabama's Wrongful Death Act, and the numerous state and federal opinions which have upheld its constitutionality, the Alabama Supreme Court held:

> "The nonapportionment of punitive damages among multiple defendants in wrongful death cases bears a rational relationship to a legitimate state interest – the prevention of homicide – and it thus does not violate constitutional guarantees."

Pet. at 14a. The court explained the rationale of its decision as follows:

> "Dr. Campbell contends that, because the jury is prohibited by law in this case from rendering separate verdicts against each defendant, the jury was unable to assess his individual liability for the death of Ms. Sumpter and, thus, the $3 million verdict rendered against him constitutes more than his fair share of the total liability for her death and is disproportionate to his wrongdoing. He argues that the nonapportionment rule, as applied to him in this case, violates his constitutional rights.
>
> * * *
>
> "We note that Alabama has historically treated actions resulting in death differently from actions causing lesser injuries. The 'enormity of the wrong' justifies the difference in treatment. The Alabama legislature, beginning in 1852, first sought 'to prevent homicides' by the enactment of a wrongful death statute. By allowing punitive damages to be assessed against multiple defendants in wrongful death actions without apportionment based upon the

degree of culpability of each, the legislature is 'attempting to preserve human life by making homicide expensive'. *Louis Pizitz Dry Goods Co., supra*, 274 U.S. at 116. Participation in actions causing the death of a human being, even if slight, can result in liability without regard to the degree of culpability, and this result, the legislature believes, will lead to greater diligence in avoiding the loss of life. The legislature has authorized the jury to ascertain an amount of damages appropriate to the goals sought to be achieved – preservation of life because of the enormity of the wrong, the uniqueness of the injury, and the finality of death. Where the enormous wrong results from the combined actions of several tortfeasors, the relative culpability of multiple defendants is only one factor that the jury may consider. Because the policy of this state is to regard human life as being beyond measure in terms of dollars, the jury must disregard the decedent's wealth or lack of wealth, it must disregard the decedent's potential for accumulating great wealth or lack of potential to accumulate wealth; and it must disregard his or her talents or education, or lack of them, as well as his or her station in life. The jury's consideration of the 'enormity of the wrong' includes assessing the finality of death, the propriety of punishing the wrongdoer or wrongdoers, whether the death could have been prevented, and, if so, the lack of difficulty that would have been involved in preventing the death, as well as the public's interest in deterring others from committing the same or similar wrongful conduct."

Pet. at 12a-13a. Following the denial of his application for rehearing in the Alabama Supreme Court, Dr. Campbell filed a timely petition for a writ of certiorari in this Court.

SUMMARY OF ARGUMENT

The petition should be denied. No special or important reason warrants this Court's review. No "conflict" exists within the meaning of Rule 10. Alabama's non-apportionment rule is strictly a matter of one state's preference for a particular tort law principle which promotes the valid social policy of deterring the negligent destruction of human life. Although many jurisdictions have rejected the non-apportionment rule, they have done so because of a policy preference, not constitutional mandate. Not one of the cases cited by petitioner discusses the non-apportionment rule in the context of a constitutional requirement. Thus, a "conflict" exists only in the sense that the various jurisdictions have developed different rules for the apportionment of punitive damages. None of these cases even suggest that federal constitutional principles require an apportionment rule.

Even if this Court were to hear this case, the petition will ultimately fail because Alabama's non-apportionment rule does not violate petitioner's due process or equal protection rights. Alabama's non-apportionment rule is rationally related to a legitimate state purpose. For over a century, Alabama has ardently protected human life by making the negligent destruction of human life expensive. In *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927), this Court allowed Alabama to impose

"extraordinary liability" in wrongful death cases in order to further its special social policy of preserving human life. *Pizitz*, 274 U.S. at 116. The "extraordinary liability" permitted in *Pizitz* was the imposition of punitive damages against a *completely innocent principal* for the acts of a negligent agent. *Id.* at 116. The decision in *Pizitz* was later reaffirmed in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), when this Court permitted Alabama to impose punitive damages against a principal for the intentional fraud of an insurance agent. *Haslip*, 499 U.S. at 14. In both cases, this Court held that the imposition of punitive damages against the corporations did not violate due process because they were able "to guard substantially against the evil to be prevented." *Pizitz*, 274 U.S. at 116; *Haslip*, 499 U.S. at 14.

The present case is analogous to this Court's decisions in *Pizitz* and *Haslip*. The issue before the Court is once again whether the imposition of punitive damages against one defendant based in part upon the culpability of another (in this case a joint tortfeasor) violates the United States Constitution. Given the holdings in *Pizitz* and *Haslip*, the non-apportionment rule easily passes constitutional scrutiny because, unlike vicarious liability for punitive damages, the non-apportionment rule applies only when all the defendants *are* guilty of wrongdoing. If a state may constitutionally impose punitive damages against a completely innocent party, surely it may impose disproportionate liability against those who are guilty of wrongdoing, particularly when the genesis of the liability is the death of a human being.

Finally, both the trial court and the Alabama Supreme Court made an individualized assessment of the $3 million jury verdict. Both courts determined that the verdict was not excessive after examining, among other things, petitioner's culpability, his ability to pay, and the future deterrence of others. Therefore, the procedures approved of in *Haslip, supra,* were utilized in this case.

REASONS FOR DENYING THE PETITION

I. NO SPECIAL OR IMPORTANT REASONS EXIST FOR THIS COURT TO REVIEW ALABAMA'S NON-APPORTIONMENT RULE

Alabama's non-apportionment rule does not possess any of the characteristics this Court considers "special and important" under Rule 10.1. Sup. Ct. R. 10.1. Alabama's decision to adopt a non-apportionment rule in wrongful death cases is purely a matter of one state's preference for a tort law which in no way implicates any federal constitutional provisions.

While other states follow different apportionment rules, Alabama's non-apportionment rule does not "conflict" with the other states within the meaning of Rule 10.1. The "conflict" between the courts is not a conflict related to the federal constitution, but is simply a difference of judicial preference in interpreting state laws, a right preserved to the states. "[T]he Fourteenth Amendment gives the federal courts ***no power*** to impose upon the States their views of what constitutes wise economic

or social policy." *Dandridge v. Williams*, 397 U.S. 471, 487-86 (1970) (emphasis added). Alabama's non-apportionment rule reflects the state's social policy to vehemently protect life and is therefore outside the scope of review this Court has defined for itself. This Court should, therefore, deny the petition.

A state's decision to allow apportionment, or, as in this case, to not allow apportionment, does not implicate the federal constitution. In fact, none of the cases cited by petitioner concerning the so-called "conflict" even mentions the constitutional ramifications of an apportionment rule. The different rules regarding apportionment followed by the various states indicate nothing more than that the states are not uniform in their approach to this issue. This, however, does not merit certiorari review.

If this Court were to review every area of the law where state courts "conflict" in the fashion described by petitioner, this Court would be essentially relegated to the task of creating a uniform common law which would supersede any "conflicting" approaches followed by the states. Consider, for example, the area of comparative negligence. Although "almost every common law jurisdiction in the world and 46 American states have replaced the outmoded doctrine of contributory negligence with some form of the doctrine of comparative negligence," *Williams v. Delta International Machinery Corp.*, 619 So. 2d 1330, 1334 (Ala. 1993) (Hornsby, C.J., dissenting), after nearly 170 years, the vestiges of the doctrine of contributory negligence remain in some states. *Williams*, 619 So. 2d at 1333. Even the states which have adopted comparative negligence "conflict" in their different applications of comparative fault. *See generally*

Thomas R. Trenkner, Annotation, *Modern Development of Comparative Negligence Doctrine Having Applicability to Negligence Actions Generally*, 78 A.L.R.3d 339 (1977 & Supp. 1993). These "conflicts," however, do not implicate the due process or equal protection clauses; rather they relate strictly to the states' preference for one rule of tort law over another – a matter this Court has traditionally left to the states. Although petitioner's arguments may be well-suited for the floor of the Alabama legislature, they do not implicate federal constitutional concerns.

> "For this Court to approve the invalidation of state economic ***or social regulation*** as 'overreaching' would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought.' "

Dandridge v. Williams, 397 U.S. 471, 484 (1970) (emphasis added).

The different approaches followed by the states in the area of apportionment were addressed by the Second Circuit in *McFadden v. Sanchez*, 710 F.2d 907 (2d Cir. 1983):

> "At one time common law judges regularly instructed juries to award punitive damages jointly against all defendants or not to award them at all. J. GHIARDI & J. KIRCHER, *Punitive Damages* § 9.09, at 27 (1981). In some jurisdictions punitive damages were jointly assessed based on the behavior of the most culpable defendant, and in others a joint assessment was made based on the behavior of the least culpable defendant. Comment, *Exemplary Damages and*

Joint Tortfeasors, 18 Wash. & Lee L. Rev. 270, 271-72 (1961).

> "In modern times American jurisdictions have come to the conclusion that punitive damages should be assessed on an individual basis."

McFadden, 710 F.2d at 913. Although most states have adopted an apportionment rule in punitive damages cases, historically, each state has been free to adopt whichever rule it believes will best further its social policy. As long as that policy choice furthers a legitimate state interest, *see infra* section II.B., the Constitution is not violated.

Similarly, no "conflict" exists within the meaning of Rule 10.1 between Alabama's non-apportionment rule and any decisions of the federal courts of appeals. In *Smith v. Lightning Bolt Productions, Inc.*, 861 F.2d 363 (2d Cir. 1988), for example, the Second Circuit, in an action alleging fraud, breach of fiduciary duty, and breach of contract, decided against non-apportionment *after interpreting New York state law.*[3] *Smith*, 861 F.2d at 371. Even in the federal cases which have independently adopted an apportionment rule, the courts specifically recognized that the decision was truly a matter of policy preference, rather than a product of constitutional mandate. *See McFadden v. Sanchez*, 710 F.2d 907 (2d Cir. 1983); *Davidson v. Dixon*, 386 F. Supp. 482 (D. Del. 1974). In *McFadden v. Sanchez*, 710 F.2d 907 (2d Cir. 1983), for example, the court adopted an apportionment rule for section 1983 claims. In

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[3] Procedurally, the issue of non-apportionment was not even properly before the Second Circuit since it had not been raised by either party. *Smith*, 861 F.2d at 374.

so doing, the court recognized that the issue of whether to apportion punitive damages varied among the various American jurisdictions:

> "While th[e apportionment] rule has not been adopted in every jurisdiction, *see, e.g., New York Times v. Sullivan*, 376 U.S. 254, 262, 84 S. Ct. 710, 716, 11 L. Ed. 2d 686 (1964) (Alabama law); *Gaston v. Gibson*, 328 F. Supp. 3 (E.D. Tenn. 1969), it is the majority rule. Moreover, it is accepted by commentators as the better view. Thus, to the extent that common law authority aids interpretation of section 1983, a construction requiring individual assessment of punitive damages is indicated."

Id. at 913-14 (citations omitted).

Thus, while there is a distinct minority and majority view on the issue of apportionment of punitive damages, Alabama's non-apportionment rule does not "conflict" with other jurisdictions within the meaning of Rule 10. Rather, other jurisdictions simply view the apportionment rule as a "better" rule. Alabama remains free to decide which version of tort law it will apply to punitive damage awards under its unique wrongful death statute. This Court does "not, of course, invalidate state law simply because [it] doubt[s a state's] wisdom." *Gertz v. Welch*, 418 U.S. 323, 349 (1974).

In sum, Alabama's non-apportionment rule reflects only that Alabama prefers not to apportion punitive damages among joint tortfeasors. Although other states have rejected this rule as outdated, the "conflict" concerns only a policy choice which has traditionally been left to the

states. Thus, no "special and important reasons" warrant this Court's review within the meaning of Rule 10.

II. ALABAMA'S NON-APPORTIONMENT RULE IS CONSTITUTIONAL

Even if this Court decides to hear this case, the decision below will ultimately be affirmed because the non-apportionment rule does not violate the Due Process Clause or the Equal Protection Clause.

A. ALABAMA'S NON-APPORTIONMENT RULE DOES NOT VIOLATE THE DUE PROCESS CLAUSE

Petitioner's right to procedural due process has not been violated. Even though the contours of due process are vague, the review of a due process challenge "demands of judges . . . ***alert tolerance toward views not shared***." *Rochin v. California*, 342 U.S. 165, 171-72 (1952) (emphasis added). Thus, actions violative of the due process clause must "do more than offend some fastidious squeamishness or private sentimentalism," but must "shock[ ] the conscience." *Id.* at 172.

Petitioner has not shown that Alabama's non-apportionment rule "shocks the conscience." Instead, petitioner has simply pointed out that other state courts have adopted an apportionment rule and that ***those*** courts might find Alabama's non-apportionment rule offensive to ***their*** "private sentimentalism."

The Alabama Supreme Court's decision is fully consistent with this Court's 1927 review of an analogous

issue arising from Alabama's Wrongful Death Act. In *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927), the petitioner argued that vicarious liability for punitive damages against one who was completely innocent of any wrongdoing violated due process. Rejecting this argument, this Court held:

> "As interpreted by the state court, the aim of the present statute is to strike at the evil of the negligent destruction of human life by imposing liability, *regardless of fault*, upon those who are in some substantial measure in a position to prevent it. We cannot say that it is beyond the power of the legislature in effecting such a change in the common law rules, to attempt to preserve human life by making homicide expensive."

Id. at 115-117 (emphasis added).

Similarly, in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), this Court held that Alabama's common law rule allowing the imposition of punitive damages against a completely innocent principal for the acts of its agent did not violate due process. *Id.* at 14. This Court reasoned that the imposition of "exemplary damages on the corporation when its agent commits intentional fraud creates strong incentive for vigilance by those in a position 'to guard substantially against the evil prevented.' " *Id.* (quoting *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112, 116 (1927)). In permitting the imposition of punitive damages against someone who did not himself contribute to the plaintiff's injury, this Court followed its prior holding in *Pizitz*.

Although *Haslip* and *Pizitz* did not specifically consider the non-apportionment rule, the liability imposed by the non-apportionment rule is less burdensome than the liability imposed in *Haslip* and in *Pizitz*. In those cases, the corporate defendants were held liable for punitive damages even though they were completely innocent of any wrongdoing (i.e., it was their agents who committed the wrongdoing). Even though the principals were not directly guilty of any wrongdoing, this Court held that due process did not prohibit the imposition of punitive damages because they were able, "in the management of their affairs, to guard substantially against the evil to be prevented." *Haslip*, 499 U.S. at 14; *Pizitz*, 274 U.S. at 116.

In contrast, the non-apportionment rule applies only when all defendants *are* guilty of misconduct. Therefore, under this Court's holding in *Haslip* and *Pizitz*, the non-apportionment rule may, without offending due process, impose "extraordinary liability" upon defendants who are not as guilty as others (assuming, *arguendo*, that were true in this case), but who were able, "in the management of their affairs, to guard substantially against the evil to be prevented." As demonstrated in the statement of the case, the jury found Dr. Campbell personally liable for causing Ms. Sumpter's death. In fact, as noted by the lower court, Pet. at 14a, Dr. Campbell was the primary tortfeasor responsible for Ms. Sumpter's death.[4]

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[4] Actually, it was *Dr. Campbell's negligence* which initiated the whole series of events which led to the hospital's liability. In essence, the hospital was found liable because it did not "catch" Dr. Campbell's errors before it was too late. The primary theory

Furthermore, petitioner's contention that Alabama's non-apportionment rule violates the principles enunciated in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), is wholly without merit. Although the Court in *Haslip* did not specifically consider whether Alabama's non-apportionment rule violated due process, this Court did approve Alabama's punitive damage procedures. *Haslip*, 499 U.S. at 22. Specifically, this Court held that Alabama provided adequate procedural safeguards against arbitrary punitive damage awards. *Id.* at 22. The procedural safeguards approved by this Court include a proper jury instruction and a separate and independent post-verdict review by both the trial court and an appellate court. *Id.*

Each of the three *Haslip* procedural due process protections were observed in this case. Petitioner concedes that the trial court properly instructed the jury on punitive damages. Pet. at 16. Petitioner contends, however, that Alabama's non-apportionment rule denied him an "individualized assessment of appropriate deterrence and retribution." *Haslip*, 499 U.S. at 20. This is not the case. Although the jury returned a general verdict against both petitioner and the hospital (i.e, the total amount of damages the jury believed would advance Alabama's social policy of punishment and deterrence), the general verdict was "individualized" because both the trial court

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against the hospital was that its *nurses* did not override the decision of a *physician* (to admit Ms. Sumpter as a patient) – an obviously difficult thing for a nurse to do. In other words, Dr. Campbell was found liable for acts of active malfeasance or commission, whereas the hospital was found liable only for acts of passive nonfeasance or ommission.

and the appellate court reviewed the verdict and considered the *isolated* impact of that verdict on petitioner in light of his wrongdoing. Specifically, in this case, because the hospital settled with Ms. Williams, petitioner received an "individualized assessment" of the remaining $3 million judgment. Both the trial court and the Alabama Supreme Court reviewed petitioner's actions, *and only his actions*, to determine whether the $3 million judgment was excessive against him.[5] Therefore, petitioner's claim that the application of the non-apportionment rule eliminates the procedures approved in *Haslip* is unfounded.[6]

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[5] Dr. Campbell asserts (Pet. at 19), that in "multiple" defendant cases, the trial court must follow the *Haslip* procedures as to each individual defendant, but must apply them to a verdict covering all defendants. This assertion is erroneous. As in this case, Alabama's post-judgment review procedures ensure that *each* defendant receives an *individualized* assessment of the jury's verdict as it applies to *his* particular circumstances (i.e. *his* culpability and *his* ability to pay the judgment); these procedures ensure, even in multiple defendant cases, that the amount of punitive damages actually recovered from each defendant does "not exceed an amount that will accomplish society's goals of punishment and deterrence." *Industrial Chemical v. Chandler*, 547 So. 2d 812, 837 (Ala. 1988).

[6] Nor does Alabama's non-apportionment rule violate substantive due process. Although petitioner briefly mentions a substantive due process claim, Pet. at 8, he does not explain his position or provide any authority to support it. Traditionally, substantive due process has been limited to instances when the government *deliberately* deprives someone of life, liberty, or property without a legitimate governmental interest. *Collins v. Harker Heights*, 112 S. Ct. 1061, 1069 n.10 (1992). In the present case, petitioner has not been deprived of a property interest because Alabama arbitrarily decided to deprive him of his property, but because *he* wrongfully caused and contributed to the death of Ms. Sumpter.

B. ALABAMA'S NON-APPORTIONMENT RULE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

Alabama's non-apportionment rule is rationally related to a legitimate state interest and, therefore, does not violate the petitioner's right to equal protection under the laws. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). The purpose of Alabama's wrongful death statute is to punish people who contribute to the negligent destruction of human life and to deter them, and others, from committing future acts which cause or contribute to the death of a human being. *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927).

Moreover, Alabama's non-apportionment rule does not violate substantive due process because the rule furthers a legitimate governmental interest – to punish and to deter people who cause or contribute to the wrongful death of human beings. "[T]he Due Process Clause 'does not purport to supplant *traditional tort law* in laying down rules of conduct to regulate liability for injuries that attend living together in society.' " *Collins*, 112 S. Ct. at 1070 (emphasis added) (quoting *Daniels v. Williams*, 474 U.S. 327, 332 (1986)). Consequently, this Court has generally denied requests to expand the concept of substantive due process in a way that would require a state to affirmatively protect a person's property interest against harm which was not a result of a state's arbitrariness or oppression. *Id.* at 1069. Petitioner's apparent suggestion that this Court *expand* substantive due process in such a way that would require Alabama to protect him from a judgment in a wrongful death case would effectively supplant Alabama's choice of tort laws and the incentives/disincentives it wishes to create thereby.

As petitioner acknowledges (Pet. at 21), the preservation of human life is a legitimate state interest. *See also Pizitz*, 274 U.S. at 116. The non-apportionment rule promotes that interest in wrongful death cases "by making homicide expensive" even for those who may be less culpable than others. *Id; see* Alabama Supreme Court's opinion, *supra* at pp. 8-9. By alerting people to the fact that even a 1% contribution toward the death of a human being can result in liability for the full measure of damages assessed by the jury, Alabama's Wrongful Death Act serves as an especially powerful deterrent.

CONCLUSION

The petition for a writ of certiorari should be denied.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JOHN H. CAMPBELL, M.D.,
Petitioner,

v.

SHARLISIA SUTTLE WILLIAMS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I. ALABAMA'S NON-APPORTIONMENT OF PUNITIVE DAMAGES PRESENTS AN IMPORTANT FEDERAL QUESTION.

Contrary to the arguments advanced by respondent, the non-apportionment of punitive damages under the Alabama Wrongful Death Act raises issues of constitutional dimensions under the due process clause and the equal protection clause.

Dr. Campbell has not challenged the non-apportionment of punitive damages as being unwise or improvident, but has challenged the constitutionality of this rule. The mere fact that a state passes legislation to further a social policy does not insulate that legislation from a constitutional challenge. As respondent acknowledges in its brief, inappropriate social legislation may violate the constitution. Res. at 15.

In the present case, the non-apportionment of punitive damages under the Alabama Wrongful Death Act denied Dr. Campbell the procedural safeguards necessary to satisfy the Fourteenth Amendment. Issues regarding whether the Alabama Wrongful Death Act violates the due process clause are unquestionably raised by the non-apportionment of punitive damages among joint tortfeasors. The non-apportionment of punitive damages erases the procedural safeguards identified by this Court in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). Furthermore, the non-apportionment of punitive damages creates the possibility that a tortfeasor will be unjustly punished as non-apportionment allows the plaintiff to arbitrarily execute damages without regard to each defendant's culpability. As this Court stated in *Honda Motor Co., Ltd. v. Oberg*:

> "What we are concerned with is the possibility that a guilty defendant may be unjustly punished; evidence of guilt warranting some punishment is not a substitute for evidence providing at least a rational basis for the particular deprivation of property imposed by the state to deter future wrongdoing."

512 U.S. ——, 114 S. Ct. 2331, 2339 (1994).

In *Honda Motor Co., Ltd.*, this Court stated that the "abrogation of a well-established common law protection against arbitrary deprivation of property raises a presumption that its procedures violate the Due Process Clause." 512 U.S. at ——, 114 S. Ct. at 2339. Non-apportionment of punitive damages erases the procedural safeguards of an "individualized assessment" of damages by the jury and meaningful post-trial review. The abrogation of these procedural safeguards raises a presumption that the non-apportionment of punitive damages under the Alabama Wrongful Death Act violates the due process clause and creates a federal question warranting this Court's review.

Furthermore, the non-apportionment of punitive damages denied Dr. Campbell equal protection of the laws.

Non-apportionment of punitive damages recognizes unreasonable classifications among defendants in cases awarding punitive damages. The non-apportionment of punitive damages is not rationally related to the preservation of human life under any conceivable circumstances. As non-apportionment of punitive damages raises a constitutional question under the equal protection clause, review by this Court is appropriate.

In its decision, the Supreme Court of Alabama held that the non-apportionment of punitive damages does not violate the due process clause or the equal protection clause. The Supreme Court of Alabama spent several pages of its opinion addressing these issues. The Supreme Court of Alabama held that the non-apportionment of punitive damages is constitutional because the non-apportionment of punitive damages is rationally related to the preservation of human life. In its opinion, the Supreme Court of Alabama has decided federal questions concerning the due process clause and the equal protection clause. Because the Supreme Court of Alabama has decided federal questions concerning the due process clause and the equal protection clause, review is warranted by this Court.

II. THE RATIONALE OF *LOUIS PIZITZ DRY GOODS CO., INC. v. YELDELL*, 274 U.S. 112 (1927), IS INAPPLICABLE TO THE PRESENT CASE.

In *Louis Pizitz Dry Goods Co., Inc. v. Yeldell*, 274 U.S. 112, an employer was found liable and assessed punitive damages under the Alabama Wrongful Death Act for the negligence of its employee. The employer argued on appeal that the imposition of liability and punitive damages without personal fault denied him the due process of law. This Court held that to impose liability upon an employer based upon the principle of respondeat superior, regardless of fault, did not violate the due process clause. This Court explained its holding by noting that the principal is in a position to prevent the

negligence of the agent. *Id.* at 116. This Court stated that it does not violate the due process clause to impose liability "upon those who, although not directly culpable, are able nevertheless, in the management of their affairs, to guard substantially against the evil to be prevented." *Id.*

The rationale of *Pizitz*, is also discussed in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). In *Haslip*, punitive damages were imposed on an insurance company for the fraudulent acts committed by its agent. This Court held that the imposition of punitive damages on the insurance company did not violate the due process clause. This Court stated that the imposition of punitive damages on the insurance company creates a financial incentive for the insurance company to prevent the agent's fraud. *Id.* at 14. Furthermore, the Court stated that "imposing exemplary damages on the corporation when its agent commits intentional fraud creates a strong incentive for vigilance by those in a position 'to guard substantially against the evil to be prevented' ". *Id.* (citing *Pizitz*, 274 U.S. 112, 116).

The rationale of these cases is that a principal is in a position to guard against and prevent the negligent, wanton, or intentional acts of its agents. By imposing punitive damages on a principal for the acts of its agent, there will be a strong financial incentive for the principal "to guard substantially against the evil to be prevented." Respondent argues that this rationale is applicable to the present case and that the non-apportionment of punitive damages does not violate the due process clause.

The rationale of *Pizitz* and *Haslip* is not applicable to the present case. In the present case, the acts of each defendant were independent and unrelated, and neither defendant was in a position to prevent the wrongful act of the other tortfeasor. While a principal may have the right to exercise control over an agent to prevent a wrong, one defendant is not in a position to prevent the unrelated

wrongful act of a totally independent tortfeasor. The principle of respondeat superior does not exist between two independent tortfeasors and cannot be used to justify the non-apportionment of punitive damages as constitutional. As an individual tortfeasor cannot prevent the acts of another individual tortfeasor, non-apportionment of punitive damages punishes the tortfeasor in part for acts he did not commit and violates the due process clause. It is clearly a violation of a defendant's constitutional rights to punish him for conduct that he did not commit nor could he have prevented.

III. ALABAMA'S NON-APPORTIONMENT OF PUNITIVE DAMAGES VIOLATES THE DUE PROCESS CLAUSE AND THE EQUAL PROTECTION CLAUSE.

This Court's opinions in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, and *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. ——, 114 S. Ct. 2331, indicate that an award of punitive damages violates the due process clause unless there are procedural safeguards in the form of proper jury instructions and post-trial judicial review of the amount awarded. This Court held in *Honda* that the abrogation of a well-established procedural safeguard against arbitrary deprivation of property raises the presumption that a procedure violates the due process clause. *Honda*, 114 S. Ct. at 2339. Furthermore, this Court held in *Honda* that "[w]hen the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of Due Process." *Honda*, 114 S. Ct. at 2340 (citing *Tumey v. Ohio*, 273 U.S. 510 (1927); *Brown v. Mississippi*, 297 U.S. 278 (1936); *In re Oliver*, 333 U.S. 257 (1948); *In re Winship*, 397 U.S. 358 (1970)).

The non-apportionment of punitive damages eliminates the procedural safeguards of proper jury instructions and post-trial judicial review of the amount awarded. This

Court held in *Haslip* and in *Honda* that a proper jury instruction is a well-established procedural safeguard. This Court held in *Haslip* that a proper jury instruction reasonably accommodates the defendant's interest in rational decision-making while allowing "meaningful individualized assessment of appropriate deterrence and retribution." 499 U.S. at 20. The "individualized assessment of appropriate deterrence and retribution" is abrogated by the non-apportionment of punitive damages. The non-apportionment of punitive damages forces the jury to return a general verdict against all defendants and does not allow the jury to apportion punitive damages among the defendants in regard to their culpability. Although the jury is instructed to make an individualized assessment of damages based on each defendant's culpability, the jury returns a general verdict representing the culpability of all defendants. In turn, the plaintiff is able to execute any of or all of the verdict against any defendant found liable, including the least culpable. A situation is created in which there is no longer individualized assessment of damages by the jury, but arbitrary decision making by the plaintiff in executing the judgment. As a defendant may be punished in part for the conduct of another defendant, this creates the possibility that a defendant may be unjustly punished.

Respondent acknowledges that the judgment returned against Dr. Campbell does not represent an "individualized assessment of appropriate deterrence and retribution" in relation to Dr. Campbell's culpability, but argues that the general verdict was "individualized" by the post-trial review of the trial court and the appellate court. Respondent argues that because the trial court and appellate court found the judgment against Dr. Campbell appropriate, Dr. Campbell received an "individualized assessment". Respondent's analysis is inaccurate.

The non-apportionment of punitive damages eliminates the procedural safeguard of proper jury instructions and allows the arbitrary deprivation of property. The non-

apportionment of punitive damages forces the jury to return a general verdict and deprives the defendant of an "individualized assessment of appropriate deterrence and retribution". Furthermore, adequate post-trial review by the trial court and the appellate court cannot serve as a substitute for a proper jury instruction. This is especially true in the present case where the $3,000,000 judgment against Dr. Campbell was not determined by the jury's "individualized assessment of appropriate deterrence and retribution", but by a settlement between the hospital and the respondent which fixed the hospital's liability at $1,000,000. After being instructed that it could not separately assess damages against the defendants, the jury returned a general verdict of $4,000,000 against the hospital and Dr. Campbell, and did not assess the $3,000,000 judgment against Dr. Campbell. The $3,000,000 judgment against Dr. Campbell does not represent an "individualized assessment" of Dr. Campbell's guilt and cannot be validated as such by the review of the trial court and appellate court. To sanction this judgment as an "individualized assessment" of Dr. Campbell's culpability would be pure speculation.

Furthermore, when multiple defendants are involved in the post-trial proceedings there can be no adequate post-trial review of the judgment. Just as the verdict is not based on the sole conduct of one defendant, neither the trial court nor the appellate court can set aside the judgment based on one defendant's conduct. The factors identified in *Haslip* which the trial court and appellate court are to consider in reviewing an award must be assessed in regard to all defendants and applied to the general verdict returned against all defendants.

Respondent also argues that "[b]y alerting people to the fact that even a 1% contribution towards the death of a human being can result in liability for the full measure of damages assessed by the jury, Alabama's Wrongful Death Act serves as an especially powerful deterrent". Res. at 23. Respondent's assessment of the non-

apportionment rule epitomizes why the non-apportionment of punitive damages is unconstitutional. To think that a general verdict of $1,000,000, $5,000,000 or $10,000,000 could be returned against two defendants and that the entirety of that verdict could be executed against a defendant that is one percent culpable is an idea that shocks the conscience. The thought is contrary to the canons of decency and the fundamental notions of justice. The possibility is created that the judgment entered against a defendant will bear no rational relationship to his guilt. To punish a defendant not in relation to his culpability, but based in part on the conduct of others creates an arbitrary deprivation of property and violates the due process clause.

CONCLUSION

The Court should grant the Writ of Certiorari to review the judgment and opinion of the Supreme Court of Alabama in *Campbell v. Williams,* No. 1920826 entered February 18, 1994.

Respectfully submitted,

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